No. 02-679-CFX Title: Desert Palace, Inc., dba Caesars Palace Hotel & Casino, Petitioner
v.
Catharina F. Costa

Docketed:
November 4, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 31 2002	Petition for writ of certiorari filed. (Response due December 4, 2002)
	Nov 21 2002	Brief of respondent Catharina F. Costa in opposition filed.
	Dec 4 2002	DISTRIBUTED for Conference of January 10, 2003
	Jan 10 2003	Petition GRANTED. SET FOR ARGUMENT April 21, 2003. **********
	Feb 27 2003	Joint appendix filed.
	Feb 27 2003	Brief of petitioner Desert Palace, Inc. filed.
	Feb 28 2003	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
	Feb 28 2003	Brief amicus curiae of United States filed.
	Mar 13 2003	CIRCULATED.
	Mar 24 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 28 2003	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law, et al. filed.
	Mar 31 2003	Brief of respondent Catharina F. Costa filed.
	Mar 31 2003	Brief amicus curiae of AFL/CIO filed.
	Mar 31 2003	Brief amicus curiae of Ann B. Hopkins filed.
	Mar 31 2003	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Mar 31 2003	Brief amicus curiae of National Employment Lawyers Association filed.
	Apr 7 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 11 2003	Reply brief of petitioner Desert Palace, Inc. filed.
	Apr 18 2003	Record filed.
	Apr 21 2003	ARGUED.
	Apr 23 2003	Record filed.

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*?

2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment, Inc., which is a publicly traded corporation. Park Place Entertainment, Inc. is unaware of any publicly traded company owning 10 percent or more of its stock.

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OPINIONS BELOW

The August 2, 2002, *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F.3d 838 (9th Cir. 2002) and is reprinted at App. 1a - 53a. The October 2, 2001, Ninth Circuit panel opinion is reported at 268 F.3d 882 (9th Cir. 2001) and is reprinted at App. 54a - 69a. The January 28, 1999, order of the United States District Court for the District of Nevada is reprinted at App. 70a - 87a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its *en banc* opinion on August 2, 2002. This petition for certiorari is timely in that Petitioner has filed it within 90 days of August 2, 2002. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. § 2000e *et. seq.* Specifically, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) and 2000e-5(g)(2)(B) are the relevant statutes involved in this Petition.

42 U.S.C. § 2000e-2(a)(1) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court —

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

STATEMENT OF THE CASE

I. Overview of the Case

The Ninth Circuit panel held that the district court committed reversible error by giving a mixed-motive jury instruction on Title VII claims in the absence of direct evidence of discriminatory animus. A 7-4 majority of the *en banc* Ninth Circuit reversed and ruled that direct evidence is not required to trigger a mixed-motive analysis in cases brought under Title VII.

The *en banc* majority holding directly conflicts with the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) on an important question of federal law and, as noted by the *en banc* dissent, places the Ninth Circuit "in conflict with almost all others." App. 51a.

II. Background of the Case

Catharina Costa was hired by Petitioner Desert Palace, Inc. dba Caesars Palace Hotel Casino ("Caesars") in 1987, and her employment was terminated in 1994 after a physical/verbal confrontation with a co-worker. App. 51a - 52a. Costa had a number of prior warnings and suspensions because of her inability to get along with others. *Id.* Costa was represented by the Teamsters Union and took her termination to arbitration through the Union. *Id.* After a hearing, the arbitrator ruled that Costa was terminated for just cause and denied the grievance. *Id.*

Costa filed this Title VII case alleging gender discrimination in connection with the conditions of her employment and her termination.[1] Over the objection of counsel for Caesars, the district court gave the jury the following "mixed-motive" instruction.

> **You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex** and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

App. 33a - 34a. (Emphasis added.)

No doubt guided by the first sentence of the mixed-motive instruction, the jury answered the first question on the verdict form as follows:

> Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment.
>
> Yes _X_ No ____

App. 88a.

III. Proceedings Below

At trial the district court overruled Caesars' objection to giving the mixed-motive jury instruction and subsequently denied Caesars' post trial motion for judgment as a matter of law. App. 57a - 58a, 86a. On appeal, the Ninth Circuit panel held that the district court erred in giving the mixed-motive jury instruction that impermissibly shifted the burden of proof on causation to Caesars. Citing *Price Waterhouse* and numerous circuit court decisions addressing the issue, the panel concluded that a mixed-motive jury instruction is only

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[1] The district court had federal question jurisdiction over this Title VII case pursuant to 28 U.S.C. § 1331.

proper if a Title VII plaintiff produces "direct and substantial evidence of discriminatory animus." App. 59a - 65a. After reviewing the evidence presented by Costa, the panel concluded that Costa did not present sufficient "direct and substantial" evidence to allow the mixed-motive jury instruction. *Id.*[2]

The Ninth Circuit granted Costa's petition for a rehearing *en banc*. In a 7-4 decision, the *en banc* majority overruled the panel and held that the district court properly gave the mixed-motive jury instruction and shifted the burden of proof to Caesars. The *en banc* majority did not hold that Costa presented direct evidence of discrimination sufficient to justify mixed-motive treatment of her case. Rather, the *en banc* majority held that direct evidence of discrimination is simply not required in Title VII cases to trigger application of the mixed-motive analysis. That holding is in direct conflict with the Court's *Price Waterhouse* decision, and it places the Ninth Circuit in conflict with all other circuit courts.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision

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[2] The panel vacated the judgment with respect to the gender discrimination claim and reversed the district court's refusal to enter judgment as a matter of law on the termination claim. App. 66a, 69a.

in conflict with the decision of another United States court of appeals on the same important matter. . . ." Finally, the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ."

All of these considerations are present in this case. Employment discrimination claims filed in federal court constitute the second most numerous type of federal claim filed.[3] Evidentiary and proof requirements under Title VII raise important questions of federal law. The *en banc* majority's holding that direct evidence of discrimination is not required to trigger a mixed-motive analysis is in direct conflict with the Court's holding in *Price Waterhouse*. In fact, the *en banc* majority considers Justice O'Connor's direct evidence requirement not as the holding of the Court, but rather as a mere "passing reference." App. 8a, 17a. The *en banc* majority's holding is also in direct conflict with decisions from other circuit courts that interpret *Price Waterhouse*. The *en banc* majority's opinion allowing the burden of proof in Title VII cases to shift to the employer without any heightened evidentiary showing is such a departure from the usual course of judicial proceedings that the Court should exercise its supervisory powers. Finally, review is warranted to provide guidance to the lower courts on the appropriate standards to follow in making direct

---

[3] In 2001, there were 21,157 employment discrimination cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2001 *Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, ⟨ http. // www.uscourts.gov / judbususc / judbus.html ⟩. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

evidence determinations in mixed-motive cases brought under Title VII.

The Court's review is warranted for all of these reasons.

I. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with the Court's *Price Waterhouse* Decision

Disparate treatment claims under Title VII can be proven by direct or circumstantial evidence. Direct evidence of intentional discrimination is "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). *See also Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("direct evidence is relatively rare"). The Court established a framework for analyzing the typical circumstantial evidence case brought under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and later elaborated in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

The *McDonnell Douglas/Burdine* framework is a three step, burden-shifting method to prove intentional discrimination despite the unavailability of direct evidence. The first step requires the plaintiff to establish a prima facie case of discrimination. Once a prima facie case is established, the burden of production, but not proof, "shifts to the employer to articulate some legitimate, nondiscriminatory reason for [the adverse action]." *McDonnell Douglas*, 411 U.S. at 802. If the employer makes such a showing, the burden shifts back to the plaintiff to prove that the articulated reason is pretextual. *Burdine*, 450 U.S. at 253-55. If the plaintiff cannot prove pretext, the employer prevails. *McDonnell Douglas*, 411 U.S. at 807. Throughout the

McDonnell Douglas/Burdine procedure the ultimate burden of proof remains at all times with the plaintiff, *id.* at 256, and it is never the employer's burden to prove the absence of discriminatory motive. *Bd. of Tr. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1978).

In 1989, the Court in *Price Waterhouse* articulated a "mixed-motive" analysis for Title VII cases that in narrow circumstances shifts the burden of persuasion on causation to the employer. The *Price Waterhouse* plurality opinion[4] stated that when mixed-motives drive an employment decision, the *McDonnell Douglas/Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47. If the plaintiff proves that an unlawful criterion "played a motivating part in an employment decision," the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent the unlawful criterion. *Id.* at 258.[5] The plurality decision did not articulate what evidence is necessary to shift the burden of persuasion to the employer in mixed-motive cases. The *Price Waterhouse* dissent[6] asserted that the *McDonnell*

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[4] Justices Brennan, Marshall, Blackmon and Stevens.

[5] The plurality further stated that when an employer carries its burden of proof, it avoids liability outright. *Id.* This part of the opinion was changed by the 1991 amendments to Title VII, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments allow limited remedies even when the employer succeeds in proving the "same decision" defense. As demonstrated below, these amendments were silent on the portion of *Price Waterhouse* that addressed the nature of the evidence necessary to trigger the mixed-motive analysis.

[6] Justices Kennedy, Rehnquist and Scalia.

Douglas/Burdine framework fully addressed the different measures through which a plaintiff could prove illegal discrimination, without shifting the burden of persuasion to the employer in a mixed-motive case. *Id.* at 279-80, 288.

Justice O'Connor's deciding concurrence agreed with the plurality's burden-shifting approach, but clarified the type of evidence necessary to trigger the mixed-motive analysis. *Id.* at 261-79. Justice O'Connor wrote separately in part to "express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262. Specifically, Justice O'Connor stated that a mixed-motive burden shifting analysis is triggered only by "**direct evidence** that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added). The concurring opinion of Justice O'Connor is the holding of the Court because it was the narrowest ground supporting the judgment. *See* Part III A, below.

The Ninth Circuit panel opinion noted that it had not previously addressed the evidentiary burden on a plaintiff in a Title VII mixed-motive case. App. 60a. The panel properly concluded that Justice O'Connor's direct evidence requirement was controlling when it decided whether to apply the mixed-motive analysis. App. 65a. After analyzing Costa's evidence, the panel concluded that Costa did not present direct evidence of discrimination. App. 63a - 65a. Consequently, the panel held that the district court erred in giving the mixed-motive jury instruction and vacated the lower court judgment . *Id.*

In a 7-4 decision, the *en banc* Ninth Circuit held that direct evidence is not required to trigger the mixed-motive

analysis and that no heightened evidentiary burden is necessary to trigger such an analysis. App. 17a - 18a. The *en banc* majority opinion directly conflicts with the Court's holding in *Price Waterhouse*. The *en banc* majority concluded that Justice O'Connor's direct evidence requirement was a mere "passing reference," and that courts that interpret *Price Waterhouse* as requiring such evidence to trigger a mixed-motive analysis are simply wrong. App. 17a - 24a. For this reason alone, the Court should grant this Petition.

The *en banc* majority opinion not only conflicts with the Court's *Price Waterhouse* holding, by but failing to impose the heightened evidentiary requirement as mandated by *Price Waterhouse*, it effectively circumvents the *McDonnell Douglas/Burdine* analysis. Without the *Price Waterhouse* evidentiary restraint on when Title VII plaintiffs may invoke the mixed-motives analysis, every plaintiff will opt for that analysis in order to shift the burden of proof on causation to the employer. "It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis." *Fernandes*, 199 F.3d at 580.

Improperly shifting the burden of proof to Caesars is exactly what the *en banc* majority did in this case. The majority recognized that: "In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different." App. 34a. Caesars suggests that this is the scenario in virtually all Title VII discharge and disciplinary cases. Following the *en banc* majority's holding, which ignores the *Price Waterhouse* heightened evidentiary burden, would result in an impermissible shift of the burden

of proof on causation to the employer in virtually all Title VII cases. Such a result is contrary to over 25 years of jurisprudence under Title VII since *McDonnell Douglas*.

II. Review Is Warranted Because the *En Banc* Majority Decision Is in Direct Conflict with Circuit Court Decisions on This Important Aspect of Federal Law

The *en banc* majority's opinion that direct evidence is not required to trigger a mixed-motive analysis creates a conflict between the Ninth Circuit and all other circuit courts that have considered the question. As the *en banc* dissenting opinion correctly noted:

> The majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990).

App. 51a.

Recent decisions from the circuit courts further confirm this conflict. *See Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (direct evidence is required to trigger the mixed-motive analysis set forth in *Price Waterhouse*); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 163 (2d Cir. 2001) ("where a plaintiff provides sufficiently direct evidence of discriminatory animus and also challenges all of defendant's proffered motives as pretextual, a jury must be instructed, if requested, to apply the *Price Waterhouse* burden-shifting analysis if it finds the employer was motivated by discriminatory animus but is not fully persuaded by the plaintiff's claims of pretext"); *Fakete v. Aetna, Inc.*, 2002 U.S. App. LEXIS 22156, at *8 (3rd Cir. 2002) ("Under *Price Waterhouse*, when an ADEA plaintiff alleging unlawful termination presents 'direct evidence' that his age was a substantial factor in the decision to fire him, the burden of persuasion on the issue of causation shifts, and the employer must prove that it would have fired the plaintiff even if it had not considered his age."); *Wagner v. Dillard Dep't. Stores, Inc.*, 2001 WL 967495, at *5 (4th Cir. 2001) ("In order to merit the more favorable mixed-motive jury instruction, a plaintiff must present 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion,'" *quoting Price Waterhouse*, 490 U.S. at 277); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 (5th Cir. 1999) (failing to reach the issue of defendant's mixed-motive defense because plaintiff failed to provide "direct evidence" of discrimination); *Laderach v. U-Haul of Northwestern Ohio, et al.*, 207 F.3d 825, 829 (6th Cir. 2000) ("Once there is direct evidence, the burden of persuasion shifts to the defendant . . ."); *Maldonado v. U.S. Bank and Manufacturers Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (court explains the difference between *Price Waterhouse* direct evidence case and *McDonnell Douglas* circumstantial evidence case); *Mohr v. Dustrol, Inc.*, 2002 U.S. App.

LEXIS 20652, at **7-8 (8th Cir. 2002) (holding that if a plaintiff "can produce direct evidence that an illegal criterion was a motivating factor in the disputed employment decision . . . the plaintiff is relieved of the ultimate burden of persuasion and the so-called 'mixed-motive' analysis is applied"); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 (10th Cir. 1999) ("Generally, a mixed-motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998) (The plaintiff did not present sufficient direct evidence to trigger the *Price Waterhouse* burden-shifting analysis.).

The conflict in the circuits created by the Ninth Circuit *en banc* majority opinion further warrants review by the Court.

III. The Reasoning of the *En Banc* Majority for Refusing to Follow *Price Waterhouse* and Other Circuit Courts Is Erroneous

As demonstrated above, the *en banc* majority held that direct evidence is not necessary to trigger the mixed-motive analysis in Title VII cases. The majority concluded that the direct evidence requirement was a mere "passing reference" and not the holding of the Court. App. 8a, 17a. The majority felt it "unnecessary" to get "mired in the debate over whether Justice O'Connor's opinion was controlling or not" because, in the majority's view, the 1991 amendments to Title VII "wholly abrogated" the premise for Justice O'Connor's direct evidence "comment." App. 17a. Finally, the majority characterized other circuit court decisions interpreting and applying the direct evidence requirement as a "quagmire," "this morass," "chaos" and "a veiled excuse to substitute their own judgment for that of a jury." App. 18a, 21a, 23a - 24a.

Rather than "get bogged down in this debate" and decide whether Costa presented direct evidence, the *en banc* majority elected to simply ignore the *Price Waterhouse* direct evidence requirement altogether. App. 18a.

None of the reasons articulated by the majority for refusing to follow the *Price Waterhouse* direct evidence requirement is valid. The majority's refusal further warrants the granting of this Petition and the exercise of the Court's supervisory power.

A. Justice O'Connor's concurring opinion in *Price Waterhouse* is the narrowest ground for the decision and is therefore controlling; the direct evidence requirement is not a mere "passing reference," but rather the holding of the Court

The concurring opinion of Justice O'Connor in *Price Waterhouse* is the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . .") Applying the principle of *Marks* to *Price Waterhouse*, Justice O'Connor's concurrence that requires direct evidence as the evidentiary prerequisite to a mixed-motive analysis is the narrowest ground supporting the judgment of the Court. *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 573, 580 (1st Cir. 1999); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1182 (2nd Cir. 1992), *cert. denied*, 506 U.S. 826

(1992).[7]

The *en banc* majority's view that the direct evidence requirement is a mere "passing reference" is erroneous and contrary to Supreme Court authority.

B. The 1991 Amendments to Title VII did not abrogate the *Price Waterhouse* direct evidence requirement

The *en banc* majority's conclusion that the 1991 amendments to Title VII somehow "abrogated" Justice O'Connor's direct evidence requirement is simply wrong. The 1991 amendments only overruled *Price Waterhouse* to the extent that before the amendment an employer who proved the "same decision" defense in a mixed-motive case could avoid liability outright. 42 U.S.C. § 2000e-2(m) and § 2000e-5(g)(2)(B).[8] These statutory amendments, however, were silent to that portion of the *Price Waterhouse* holding that direct evidence is required to trigger a mixed-motive case in the first place. *Fields v. New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997) ("[T]he House Committee report makes it clear that section 107 was enacted solely to overrule the part of *Price Waterhouse* that allowed an employer to avoid liability by prevailing on its dual motivation defense."). *See also Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3rd Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

[7] The *Price Waterhouse* dissent agreed that Justice O'Connor's opinion was the holding of the Court. The dissent read the holding in *Price Waterhouse* as shifting the burden to the employer only "in a limited number of cases" where the "plaintiff proves by **direct evidence** that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added).

[8] After the 1991 amendments an employer who proves the "same decision" defense limits but does not avoid liability altogether.

Congress did not overrule or reject the direct evidence requirement in mixed-motive cases as demonstrated above. All circuit courts after the 1991 amendments still require direct evidence to trigger the mixed-motive analysis. The 1991 amendments did not "abrogate" the direct evidence requirement in *Price Waterhouse* as claimed by the *en banc* majority.

IV. Review Is Also Warranted to Resolve the Confusion Among the Lower Courts Regarding the Appropriate Standards to Follow in Making a Direct Evidence Determination in Mixed-Motive Cases

Another reason cited by the *en banc* majority for rejecting the *Price Waterhouse* direct evidence requirement is the "chaos" created by the efforts of circuit courts to define and apply the direct evidence requirement. App. 21a. The *en banc* majority cites Judge Selya's description of the various approaches used by the circuit courts to apply the direct evidence requirement that is set out in *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999). App. 19a - 21a. *Fernandes* argues that application of the direct evidence requirement "has created a patchwork of intra-circuit conflicts" and then places the circuit courts within these various camps. *Id.* at 582-83. *Fernandes* categorizes the circuit court approaches on this issue as follows: (1) the

"classic" approach, (2) the "animus plus" approach, and (3) the "animus" standard. *Id.* at 579-583.

Circuit courts are using different approaches to apply the *Price Waterhouse* direct evidence requirement, but they are not ignoring the requirement. The "chaos" caused by these different approaches does not provide cover for the *en banc* majority simply to ignore the requirement and shift the burden of proof improperly to the employer in Title VII cases. This is not a case where the *en banc* majority is simply incorrect in its application of the *Price Waterhouse* evidentiary requirement. Rather, the *en banc* majority has decided simply to ignore the requirement.

The "chaos" caused by the various approaches used by the circuit courts to apply the direct evidence requirement does not allow the *en banc* majority to ignore the requirement, but it does provide yet another reason for granting this Petition. With this Petition, Caesars asks the Court to conclude that the Ninth Circuit *en banc* majority erroneously held that direct evidence is not required to trigger a mixed-motive analysis in Title VII cases. Caesars also asks the Court to use this case to provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis. Such guidance will enable lower courts to discern what evidence is required to trigger the mixed-motive analysis and will put an end to the "chaos" cited by the *en banc* majority and the *Fernandes* case. The *Price Waterhouse* dissent predicted that the holding of the Court that day was "certain to result in confusion." *Price Waterhouse*, 490 U.S. at 279 (Kennedy, J., dissenting). It has. What no one could have predicted was that a lower court would simply ignore the *Price Waterhouse* holding.

CONCLUSION

The petition for a writ of certiorari should be granted. The *en banc* majority opinion conflicts with the holding of the Court in *Price Waterhouse* and with other circuit court decisions. The Court should reverse the *en banc* majority for these reasons. Caesars further requests that the Court grant this Petition and provide uniform guidance to the lower courts as to what constitutes direct evidence for purposes of triggering the mixed-motive analysis in Title VII cases.

Respectfully submitted.

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OCTOBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15645

[Filed August 2, 2002]

CATHARINA F. COSTA, Plaintiff-Appellee,	)
v.	)
DESERT PALACE, INC., dba Caesars Palace Hotel & Casino, Defendant-Appellant.	)

Appeal from the United States District Court
for the District of Nevada
D.C. No. CV-96-00009-DWH/RJJ
David Warner Hagen, District Judge, Presiding

JUDGES:
Before: Mary M. Schroeder, Chief Judge, Stephen Reinhardt, Alex Kozinski, Ferdinand F. Fernandez, Andrew J. Kleinfeld, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Raymond C. Fisher, Ronald M. Gould, and Richard A. Paez, Circuit Judges. Opinion by Judge McKeown; Dissent by Judge Gould.

OPINION

McKEOWN, Circuit Judge:

We agreed to hear this case en banc[1] primarily to examine the legal standard for proof of a violation of Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991. In this classic instance of what has been termed a "mixed-motive" case, the employer, Caesars Palace Hotel and Casino ("Caesars"), terminated Catharina Costa, the only woman in her bargaining unit, citing disciplinary problems. Costa argued, and the jury agreed, that sex was "a motivating factor" in her termination. 42 U.S.C. § 2000e-2(m). Because Caesars failed to establish that she would have been terminated without consideration of her sex, the jury awarded back pay and compensatory damages. Finally, the jury found that the discrimination was "egregious" and warranted punitive damages. Caesars argues that Costa should have been held to a special, higher standard of "direct evidence," a threshold it claims she did not meet. We disagree. Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called "mixed-motive" case. Consequently, we affirm the liability finding as well as the judgment for back pay and compensatory damages. In light of intervening Supreme Court authority, we remand with respect to punitive damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999).

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[1] *Costa v. Desert Palace, Inc.*, 268 F.3d 882 (9th Cir. 2001), *reh'g en banc granted*, 274 F.3d 1306 (9th Cir. 2002).

BACKGROUND

Catharina Costa is a trailblazer. She has worked most of her life in a male-dominated environment, driving trucks and operating heavy equipment. At Caesars, a well known casino in Las Vegas, she worked in a warehouse and, along with members of her bargaining unit, Teamsters Local 995, operated the forklifts and pallet jacks to retrieve food and beverage orders. Costa was the only woman in this job.

Costa's work was characterized as "excellent" and "good." As her supervisor explained: "We knew when she was out there the job would get done." Nonetheless, she experienced a number of problems with management and her co-workers. At first, she responded by simply focusing on doing her job well. Slowly, Costa began to notice that she was being singled out because she was a woman. Her concerns not only fell on deaf ears - "my word meant nothing" - but resulted in her being treated as an "outcast."

In a series of escalating events that included informal rebukes, denial of privileges accorded her male co-workers, suspension, and finally discharge, Costa's efforts to resolve problems were thwarted along the way. The situation deteriorated so significantly that she finally complained to the human resources department, which declined to intervene.

There were "so many" incidents, it was difficult for her to recount them all. Nonetheless, her testimony at trial on this point was detailed and extensive. For example, when men came in late, they were often given overtime to make up the lost time; when Costa came in late - in one case, one minute late - she was issued a written reprimand, known as a record

of counseling. When men missed work for medical reasons, they were given overtime to make up the lost time; when Costa missed work for medical reasons, she was disciplined. On one occasion, a warehouse supervisor actually suspended her because she had missed work while undergoing surgery to remove a tumor; only the intervention of the director of human resources voided this action.

In another episode, corroborated at trial by a fellow employee who was an eyewitness, a number of workers were in the office eating soup on a cold day. A supervisor walked in, looked directly at Costa, and said, "Don't you have work to do?" He did not reprimand any of her colleagues - all men. Another supervisor began to follow her around the warehouse. Although several other Teamsters complained about this supervisor's scrutiny, three witnesses, in addition to Costa, testified that she was singled out for particularly intense "stalking."

Costa presented extensive evidence that she received harsher discipline than the men. For instance, she was frequently warned and even suspended for allegedly hazardous use of equipment and for use of profanity, yet other Teamsters engaged in this conduct with impunity. In at least one instance, such a charge against Costa was found to have been fabricated and the suspension voided. Supervisors began to "stack" her disciplinary record. In one case, a supervisor issued multiple warnings on a single day, including docking her for an absence that dated back over eight months and for absences that occurred when Costa was under a doctor's care. Another warehouse manager steered a co-worker who had a dispute with Costa to security instead of handling the matter

himself because the manager wanted to bring "this problem with Costa to a 'head.'"

Costa was also treated differently than her male colleagues in the assignment of overtime. For example, in an analysis of 95.5 hours of overtime assigned to eight Teamsters, Costa received only two hours. Failure to assign overtime was not for Costa's lack of willingness to work additional hours. Costa was listed as "refusing" overtime when she was on vacation. When she was offered overtime, it was at the last minute, making it impractical for her to accept. The situation became more blatant when Costa asked her supervisors point blank about the differential treatment of another Teamster who was favored with overtime assignments. The response: He "has a family to support."

Costa also presented evidence that she was penalized for her failure to conform to sexual stereotypes. Although her fellow Teamsters frequently lost their tempers, swore at fellow employees, and sometimes had physical altercations, it was Costa, identified in one report as "the lady Teamster," who was called a "bitch," and told "you got more balls than the guys." Even at trial, and despite testimony that she "got along with most people" and had "few arguments," Caesars' managers continued to characterize her as "strong willed," "opinionated," and "confrontational," leading counsel to call her "bossy" in closing argument. Supervisor Karen Hallett, who later signed Costa's termination order, expressly declared her intent to "get rid of that bitch," referring to Costa.

Supervisors frequently used or tolerated verbal slurs that were sex-based or tinged with sexual overtones. Most

memorably, one co-worker called her a "fucking cunt." When she wrote a letter to management expressing her concern with this epithet, which stood out from the ordinary rough-and-tumble banter, she received a three-day suspension in response. Although the other employee admitted using the epithet, Costa was faulted for "engaging in verbal confrontation with co-worker in the warehouse resulting in use of profane and vulgar language by other employee."

These events culminated in Caesars' termination of Costa. The purported basis for termination was a physical altercation in the warehouse elevator with another Teamster, Herb Gerber. This incident began, as Gerber admitted, when he went looking for Costa, upset about a report that he believed she had made about his unauthorized lunch breaks. Gerber trapped Costa in an elevator and shoved her against the wall, bruising her arm. Costa gave a detailed account of the altercation. Right away she told supervisor Hallett. Reassured that Hallett would investigate, Costa returned to work, only to have Gerber seek her out and "come at" her a second time. Costa's account was also corroborated by her immediate reports to union officials, by photographs of the bruises, and by a witness who had seen Gerber blocking the elevator door. In contrast, Gerber did not immediately report the incident, had no physical corroboration, and provided few details. He first denied that the altercation was physical, but then changed his story to state that Costa had, in fact, hit him.

Nonetheless, Caesars did not believe Costa. Caesars reasoned that the facts were in dispute, so it disciplined both employees - Gerber with a five-day suspension and Costa with termination.

Both Costa and Gerber grieved their respective disciplines pursuant to the collective bargaining agreement, which did not cover sex discrimination. The arbitrator upheld both actions. After receiving an EEOC right to sue letter, Costa filed this suit. The trial court dismissed her claim of sexual harassment on summary judgment, but allowed the other disparate treatment claim to proceed.

At trial, Caesars maintained that Costa was terminated because of her disciplinary history and her altercation with Gerber. Costa did not suggest that she was a model employee, but rather that her sex was a motivating factor in her termination. After hearing Costa's testimony, Judge Hagen, the trial judge, admonished counsel: "This is a case that should have settled." He denied Caesars' motion for judgment as a matter of law at the close of Costa's case, which was renewed at the close of the evidence. The jury returned a verdict in favor of Costa for $64,377.74 back pay, $200,000 compensatory damages, and $100,000 punitive damages. When Judge Hagen denied defense motions for judgment as a matter of law notwithstanding the verdict, and for a new trial, he elaborated as follows: "At trial, the evidence showed a pattern of disparate treatment favoring male co-workers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars's conduct towards plaintiff ...." He did, however, grant remittitur, and Costa agreed to reduce compensatory damages to $100,000.

DISCUSSION

Title VII itself provides the benchmark for resolving the primary question in this case. Although the road from Title VII to resolution of Costa's case rests ultimately on a straightforward examination of the statute, it is helpful to examine the statute's structure and the history of the 1991 amendments to the statute. After analyzing the import of the passing reference to "direct evidence" in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), and the framework for Title VII cases, we address the evidence in Costa's case, including the claim that evidence of an arbitration award was erroneously excluded, and the propriety of giving a "mixed-motive" jury instruction. We conclude by examining the punitive damages award in light of *Kolstad*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118.

I. TITLE VII STATUTORY FRAMEWORK AND DEVELOPMENT

Title VII prohibits discrimination "because of" a protected characteristic, such as race or sex. Such discrimination is deemed "an unlawful employment practice":

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

> compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(a).

The 1991 Act added § 2000e-2(m), which provides that "an unlawful employment practice is established" when a protected characteristic is "a motivating factor" in an employment action:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Civil Rights Act of 1965, Title VII, § 701, 42 U.S.C. § 2000e-2(m) (as amended by Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (1991)).

The 1991 Act also provided an affirmative defense that limits the remedies if an employer demonstrates that it would have nonetheless made the "same decision":

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

We think this text is crystal clear: an employee makes out a Title VII violation by showing discrimination "because of" race, sex, or another protected factor. Such discrimination is characterized by the statute as "an unlawful employment practice."

More specifically, "an unlawful employment practice" encompasses any situation in which a protected characteristic was "a motivating factor" in an employment action, even if there were other motives. In such a case - sometimes labeled with the "mixed-motive" moniker - if the employee succeeds in proving only that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether, but instead may assert an affirmative defense to bar certain types of relief by showing the absence of "but for" causation.

The amendments to the statute have done nothing to change the plaintiff's long-standing burden: "The ultimate

burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *accord Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000). Nor can we discover anything in this statute that warrants imposing a special evidentiary rule on or hurdle for victims of discrimination to prove their case.

> The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [it] may find in favor of the party who has the burden to persuade the [jury] of the fact's existence.'"

Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622, 124 L. Ed. 2d 539, 113 S. Ct. 2264 (1993) (quoting *In re Winship*, 397 U.S. 358, 371-72, 25 L. Ed. 2d 368, 90 S. Ct. 1068, 51 Ohio Op. 2d 323 (1970) (Harlan, J., concurring) (citation omitted)). The inquiry is simply that of any civil case: whether the plaintiff's evidence is sufficient for a rational factfinder to conclude by a preponderance of the evidence that the employer violated the statute - that "race, color, religion, sex, or national origin was a motivating factor for any employment practice."

A. *PRICE WATERHOUSE*

Although Title VII imposes no special burden of proof on discrimination plaintiffs, some courts have fashioned a heightened burden based not on the statute but on the case that prompted its amendment, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). We turn to that case. There, the Supreme Court confronted a problem not previously encountered in the statute's twenty-five year history: causation. The issue presented was whether there should be liability where an adverse employment decision was the result of mixed motives. More specifically, the trial court found that the failure to select Ann Hopkins for partner at an accounting firm was motivated both by legitimate concerns about her interpersonal skills and by "an impermissibly cabined view of the proper behavior of women." 490 U.S. at 236-37.

All nine justices essentially agreed that liability was inappropriate where the employer would have made the same decision absent sex discrimination - in other words, the illegitimate factor was not a "but for" cause - but they divided over the nuances of the burden of proof. Four justices agreed that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 258 (plurality opinion). These justices made clear that when "an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of' sex." *Id.* at 241. But, the employer could escape liability through the "same decision"

affirmative defense. The dissent criticized the plurality for "its shift to the defendant of the burden of proof," *id.* at 281 (Kennedy, J., dissenting), and argued that the plaintiff should have to prove, by a preponderance of the evidence, that discrimination was the "but for" cause of the challenged action. In response, the plurality emphasized that it offered the defendant an affirmative defense to liability only *after* the plaintiff established that discriminatory animus played a role in the challenged employment action:

> Since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not ... one of "shifting burdens" .... Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another.

Id. at 246. Regardless of nomenclature, the plurality agreed that if the employer showed a lack of "but for" causation, then that showing precluded liability.

Justice O'Connor and Justice White each wrote separately, concurring in the judgment only. Justice White relied on *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), a First Amendment case holding that a showing that constitutionally protected conduct had been a "motivating factor" in an employment decision was sufficient to shift the burden to the state to prove the absence of causation. *Price*

Waterhouse, 490 U.S. at 258-59 (White, J., concurring in the judgment). He found it unnecessary to parse the semantic distinction whether "the *Mt. Healthy* approach is 'but-for' causation in another guise or creates an affirmative defense." *Id.* at 259. Justice O'Connor traced the burdenshifting approach back to venerable tort cases such as *Summers v. Tice, 33 Cal.* 2d 80, 199 P.2d 1, 3-4 (Cal. 1948). *Price Waterhouse*, 490 U.S. at 263-64 (O'Connor, J., concurring in the judgment).

Justice O'Connor had further gatekeeping concerns about when what she considered to be a special "burden shift" might be invoked, thus permitting the plaintiff to make less than the full showing necessary for a statutory violation:

> I believe there are significant differences between shifting the burden of persuasion to the employer in a case resting purely on statistical proof as in the disparate impact setting and shifting the burden of persuasion in a case like this one, where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision.

Id. at 275. It was in this context that she discussed a need for "direct evidence" to show that the employer's "decisional process has been substantially infected by discrimination" before the special burden shift would be triggered. *Id.* at 269-70. Because it was arguably the "narrowest ground" for the decision, Justice O'Connor's one-justice concurring opinion was considered by some to be the controlling analysis. *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572,

580 (1st Cir. 1999); *but see Thomas v. Nat'l Football League Players Ass'n*, 327 U.S. App. D.C. 348, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment ..., so that it is far from clear that [it] should be taken as establishing binding precedent."), *as vacated in part on reh'g*, 1998 U.S. App. LEXIS 3634, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) ("'Direct evidence' was *not* a requirement imposed by the majority in *Price Waterhouse.*").

B. 1991 CIVIL RIGHTS ACT AMENDMENTS TO TITLE VII

Congress quickly responded to *Price Waterhouse* and a handful of other Supreme Court employment discrimination decisions with the introduction of the Civil Rights Act of 1990, which targeted "the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." H.R. Conf. Rep. No. 101-856, at 1 (1990). Although the 1990 legislation ultimately floundered, an amended version, with much of the text intact, became the Civil Rights Act of 1991, which expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing the absence of "but for" causation.

Now, under Title VII, the use of a prohibited characteristic (race, color, religion, sex, or national origin) as simply "a motivating factor" in an employment action is unlawful. 42 U.S.C. § 2000e-2(a)(1). Congress did, however, add one safety valve: an employer can escape damages and orders of reinstatement, hiring, promotion and

the like - but not attorney's fees or declaratory or injunctive relief - by proving the absence of "but for" causation as an affirmative defense. *Id.* § 2000e-2(m). To the extent that there was confusion after *Price Waterhouse* - semantic or otherwise - with respect to burden shifting, the amendment clarified (1) that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in the employment action and (2) that the employer's "same decision" evidence serves as an affirmative defense with respect to the scope of remedies, not as a defense to liability.

The legislative history evinces a clear intent to overrule *Price Waterhouse*. In a subsection titled "The Need to Overturn *Price Waterhouse*," the report accompanying the 1991 Civil Rights Act reflects congressional concern that the "inevitable effect of the *Price Waterhouse* decision [was] to permit prohibited employment discrimination to escape sanction under Title VII." H.R. Rep. No. 102-40(I), at 46 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 584. The report elaborates:

> When Congress enacted the Civil Rights Act of 1964, it precluded all invidious consideration of a person's race, color, religion, sex or national origin in employment. The effectiveness of Title VII's ban on discrimination on the basis of race, color, religion, sex or national origin has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins*.

Id. at 45. We do not disagree with those courts that have noted that the legislative history does not address Justice

O'Connor's "direct evidence" comment. *See, e.g., Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 218-19 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147, 148 L. Ed. 2d 961, 121 S. Ct. 1086(2001).[2] What the history does show beyond doubt, however, is that the premise for Justice O'Connor's comment is wholly abrogated: No longer may "employers' discriminatory conduct escape[]liability," H.R. Rep. 40(I) at 47, simply by showing other sufficient causes. Consequently, there is no longer a basis for any special "evidentiary scheme" or heightened standard of proof to determine "but for" causation.

C. "DIRECT EVIDENCE"

Following *Price Waterhouse* and the Civil Rights Act of 1991, much has been made of Justice O'Connor's passing reference to "direct evidence." Indeed, the reference has spawned a virtual cottage industry of litigation over the effect and meaning of the phrase. It is unnecessary, however, to get mired in the debate over whether Justice O'Connor's opinion was controlling or not because the resolution to this conundrum lies in the 1991 amendments.

Justice O'Connor's reference must be interpreted in light of the Court's understanding at the time of *Price Waterhouse*, namely, that "but for" causation was factored into proof of a Title VII violation, either as an affirmative

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[2] For a thorough analysis concluding that the legislative history is unhelpful on the "direct evidence" requirement, see Benjamin C. Mizer, Note, *Toward a Motivating Factor Test for Individual Disparate Treatment Claims*, 100 Mich. L. Rev. 234, 256-60 (2001).

defense (plurality) or as part of the plaintiff's proof (dissent). Justice O'Connor wrote separately in part to "express [her] views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Price Waterhouse*, 490 U.S. at 262. Her reference to "direct evidence" was intertwined with her concern about a scheme that shifted the burden on the question of liability from the employee to employer, albeit through an affirmative defense. The 1991 Act eliminated any confusion about burden-shifting and the proof necessary for a Title VII violation, so it is not surprising that courts have had trouble converting Justice O'Connor's reference into a legal standard under the new statutory provision.

The resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators. Within circuits, and often within opinions, different approaches are conflated, mixing burden of persuasion with evidentiary standards, confusing burden of ultimate persuasion with the burden to establish an affirmative defense, and declining to acknowledge the role of circumstantial evidence. We see no need to get bogged down in this debate. Rather, based on the language of the statute - which requires proof of only "a motivating factor" and does not set out any special proof burdens - we conclude that Congress did not impose a special or heightened evidentiary burden on the plaintiff in a Title VII case in which discriminatory animus may have constituted one of two or more reasons for the employer's challenged actions. 42 U.S.C. § 2000e-2(m).

Id. This approach is consistent with recent Supreme Court cases underscoring that no special pleading or proof hurdles may be imposed on Title VII plaintiffs. For example, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 997-99, 152 L. Ed. 2d 1 (2002), the Court struck down judicially imposed heightened pleading standards. Just two years earlier, in *Reeves*, 530 U.S. at 148, it declined to require independent evidence of discrimination in addition to prima facie evidence and sufficient evidence to rebut pretext. Instead, the Court emphasized that the jury determines the ultimate question of liability. Sticking to the statutory wording, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80-81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998), the Court rejected various circuits' special requirements for same-sex sexual harassment cases. *Finally, in Burlington Industries, Inc. v. Ellereth*, 524 U.S. 742, 752-53, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998), the Court quashed distinctions between "quid pro quo" and "hostile environment" liability structures in harassment cases. Here, too, we believe that we are well advised to follow the statute instead of engaging in judicial invention.

To understand why we should stick to the statute rather than divine a new standard of proof, it is instructive to look at the state of circuit law in this area. Judge Selya has made an attempt to categorize the circuits' approaches in a framework that provides a useful overview. *Fernandes*, 199 F.3d at 582. He first discusses the "classic" position, an approach that takes the definition of "direct evidence" from the dictionary: "'evidence, which if believed, proves existence of fact in issue *without inference or presumption*.'" *Rollins v. Tech- South, Inc.*, 833 F.2d 1525, 1529 n. 6 (11th Cir. 1987) (quoting *Black's Law Dictionary* 413 (5th ed.

1979)) (emphasis in *Rollins)*. Judge Selya notes that "only the Fifth and Tenth Circuits cling consistently to this view, [but] other tribunals have embraced it periodically." *Fernandes*, 199 F.3d at 582.

Next is the "animus plus" position, which basically requires that the plaintiff prove a particularly strong case - more than ordinarily would be required for an inference of discrimination to be permissible. Our review indicates that a majority of courts that impose a "direct evidence" requirement adhere to this view, either explicitly or implicitly. *See, e.g., Thomas*, 131 F.3d at 204 (defining direct evidence as "a relationship between proof and incidents"); *Fernandes*, 199 F.3d at 580 (explaining the function of direct evidence as restricting the mixed-motive analysis "to those infrequent cases in which a plaintiff can demonstrate [discrimination] with a high degree of assurance"); *Fuller v. Phipps*, 67 F.3d 1137, 1143 (4th Cir. 1995) (holding that the determination "hinges on the strength of the evidence"); *Bass v. Bd. of County Comm'rs*, 256 F.3d 1095, 1105 (11th Cir. 2001) (requiring, under the rhetoric of banning circumstantial evidence, "only the most blatant remarks") (citation omitted). Judge Selya places the Fourth, D.C., Ninth,[3] and Third circuits in this camp, not without hesitation, and indicates that other circuits indicate "occasional approval" of this approach. *Fernandes*, 199 F.3d at 582.

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[3] We view this categorization of Ninth Circuit law as misplaced. The case cited in *Fernandes, Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir. 1999) (en banc), does not adopt the "animus plus" approach.

Finally, there is the "animus" position, which simply requires evidence that bears on the alleged discriminatory animus or, put even more simply, evidence of discrimination. Judge Selya places the Second Circuit, the Eighth Circuit "intermittently," and other stray cases, in this camp. *Id.*

Other courts and commentators have had even more difficulty articulating an order to the chaos. *See, e.g., Thomas*, 131 F.3d at 205 (citing Fifth, Tenth, and Eleventh Circuits as taking "direct evidence" to mean non-inferential); Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 Cornell L. Rev. 899, 908-15 (2001); Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 Mercer L. Rev. 651, 663 (2000) ("The line between *McDonnell Douglas* and *Price Waterhouse* is very murky.").

Indeed, within circuits, cases sometimes take different approaches. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1294 (11th Cir. 1999) (recognizing intra-circuit splits). For example, the First Circuit first embraced the animus plus approach in *Fernandes*, 199 F.3d at 580, but recently implied in *Weston-Smith v. Cooley Dickinson Hospital*, 282 F.3d 60, 64 (1st Cir. 2002), that it took the classic approach. The Eleventh Circuit first allowed "broad statements" of discriminatory attitude, *Burrell v. Bd. of Trustees of Ga. Military Coll.*, 125 F.3d 1390, 1394 n. 7 (11th Cir. 1997), but later concluded that only statements related to the decisionmaking process were sufficient to overcome the special "direct evidence" hurdle, *Bass*, 256 F.3d at 1105.

In a carefully considered decision issued shortly after the Civil Rights Act of 1991, the Second Circuit held that direct evidence simply meant evidence sufficient to permit the trier of fact to conclude that an illegitimate characteristic was a motivating factor in the challenged decision under Title VII. *Tyler*, 958 F.2d at 1185. However, a few months later, a different panel held that discrimination victims face the special hurdle of presenting "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). Although *Ostrowski* squarely rejected a definition of "direct evidence" as non-circumstantial evidence, *id.* at 181, some cases quote it as though it supported the noncircumstantial requirement. *See, e.g., Cronquist v. City of Minneapolis*, 237 F.3d 920, 925 (8th Cir. 2001). *Ostrowski* was an age discrimination case, but has been widely applied in the Title VII context, apparently without analysis of the difference in the statutes. *See, e.g., Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 913 (2d Cir. 1997).

In the Tenth Circuit, the court initially declined to impose a heightened "direct evidence" requirement, only to be ignored by a panel ruling six months later. *Compare Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 553 (10th Cir. 1999) ("A mixed motive instruction is ... appropriate in any case where the evidence is sufficient to allow a trier to find both forbidden and permissible motives." (citation and internal quotation marks omitted)) *with Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (imposing a "direct evidence" requirement as classically

defined, and excluding "statements of personal opinion, even when reflecting a personal bias").

We believe that the best way out of this morass is a return to the language of the statute, which imposes no special requirement and does not reference "direct evidence." To the extent that courts are using "direct evidence" as a veiled excuse to substitute their own judgment for that of the jury, we reject that approach. In so doing, we follow the Second Circuit's *Tyler* case, 958 F.2d at 1184-85, the Eleventh Circuit's *Wright* case, 187 F.3d at 1301-02, the Tenth Circuit's approach in *Medlock*, 164 F.3d at 553, and the Eighth Circuit in *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991). We also agree with other courts to the extent that they hold that non circumstantial evidence is not the magical threshold for Title VII liability. *See, e.g., Thomas*, 327 U.S. App. D.C. at 355 (collecting cases).

Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial)[4] that a protected characteristic played "a motivating factor." Like the Supreme Court, "we think it generally undesirable, where holdings of

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[4] The general rule bears repeating: in proving a case, circumstantial evidence "is weighed on the same scale and laid before the jury in the same manner as direct evidence." *United States v. King*, 552 F.2d 833, 845 (9th Cir. 1976) (citing *Holland v. United States*, 348 U.S. 121, 139-40 (1954)). In other words, "circumstantial evidence is not inherently less than probative than direct evidence." *United States v. Cruz*, 536 F.2d 1264, 1266 (9th Cir. 1976) (citation and internal quotation marks omitted).

the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn in.

D. THE FRAMEWORK FOR PROVING A TITLE VII VIOLATION

In addition to the confusion over "direct evidence," there has been considerable misunderstanding regarding the relationship among the *McDonnell Douglas* burden-shifting analysis (sometimes referred to as "pretext" analysis), which primarily applies to summary judgment proceedings, and the terms single-motive and mixed-motive, which primarily refer to the theory or theories by which the defendant opposes the plaintiff's claim of discrimination. The short answer is that all of these concepts coexist without conflict.

Caesars' argument in favor of a higher evidentiary burden is emblematic of the confusion. Caesars maintains that without special proof, "any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases." This argument mistakenly juxtaposes the pretrial *McDonnell Douglas* legal framework and the "mixed-motive" characterization.

To place *McDonnell Douglas* in perspective, it must be remembered that the current form of Title VII is the result of twenty-seven years of dynamic exchange between the Supreme Court and Congress, working toward a framework

that provides a remedy for barriers of discrimination and inequality in the workplace. Early in the statute's history, the Supreme Court distinguished disparate impact claims under Title VII § 703(a)(2) from disparate treatment claims under § 703(a)(1). Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 703(a). Disparate treatment claims require the plaintiff to prove that the employer acted with conscious intent to discriminate. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805-06, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973) (distinguishing *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971)).

McDonnell Douglas was the first in a series of cases dealing with the difficulties of proving intent to discriminate in a disparate treatment context. The Supreme Court detailed circumstances sufficient to support an inference of discrimination, the now-eponymous *McDonnell Douglas* "prima facie case and burden-shifting paradigm."[5] The Court recently reaffirmed that "the precise requirements of a prima facie case can vary depending on the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Swierkiewicz*, 122 S. Ct. at 995 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978)). This legal proof structure is a tool to assist

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[5] This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, 411 U.S. at 802.

plaintiffs at the summary judgment stage so that they may reach trial.

As the Supreme Court elaborated a few years after *McDonnell Douglas*, the prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine,* 450 U.S. at 254. Therefore, "we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* (citation and internal quotation marks omitted). *Burdine* clarified, however, that the plaintiff need not rely on this presumption: "She may succeed ... either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

Throughout these cases and those that followed, the court reaffirmed the canons of proof: the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination," *id.* at 256; the question comes down to whether she has made her case. *See also Hicks*, 509 U.S. at 511; *Reeves*, 530 U.S. at 142-49.

The plaintiff may make out a prima facie case - which may, admittedly, be a weak showing - that entitles her to a commensurately small benefit, a transitory presumption of discrimination: the burden of *production* only shifts briefly to the employer to explain why it took the challenged action, if not based on the protected characteristic. In practice, employers quickly rebut the presumption and it "drops from the case." *Burdine*, 450 U.S. at 256 n. 10; *see also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment after*

Hicks, 93 Mich. L. Rev. 2229, 2302-04 (1995). The burden of production then shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that the employer's proffered reason was pretextual. The burden of *persuasion* always remains with the employee to prove the ultimate Title VII violation - unlawful discrimination.

It is important to emphasize, however, that nothing compels the parties to invoke the *McDonnell Douglas* presumption. *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 717, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983). Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence - direct or circumstantial - of discriminatory intent. 460 U.LS. at 714 & n. 3, 717. Thus, although *McDonnell Douglas* may be used where a single motive is at issue, this proof scheme is not the exclusive means of proof in such a case. Indeed, it also might be invoked in cases in which the defendant asserts a "same decision" defense to certain remedies, a circumstance in which mixed motives are at issue.

Regardless of the method chosen to arrive at trial, it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury.[6] At that stage,

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[6] The presumption is thus what has been termed a "bursting bubble" presumption. In one limited circumstance, the presumption retains vitality at trial: where there is no rebuttal by the employer, but the plaintiff's prima facie case is in factual dispute. The jury then determines whether the prima facie case is established. If it is, the jury must find discrimination. *Hicks*, 509 U.S. at 509-10.

the framework "unnecessarily evades the ultimate question of discrimination *vel non*." *Aikens*, 460 U.S. at 714.

Once at the trial stage, the plaintiff is required to put forward evidence of discrimination "because of" a protected characteristic.[7] After hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly. This determination is distinct from the question of whether to invoke the *McDonnell Douglas* presumption, which occurs at a separate, earlier stage of proceedings, involves summary judgment rather than jury instructions, and is unrelated to the number of possible motives for the challenged action. Instead, the choice of jury instructions depends simply on a determination of whether the evidence supports a finding that just one - or more than one - factor actually motivated the challenged decision. Justice White, in his concurring opinion in *Price* Waterhouse, succinctly described how the type of evidence presented affects the question facing the jury:

> In [single-motive] cases, "the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision." In mixed-motive cases, however, there is no one "true" motive behind the decision.

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[7] As the Supreme Court has observed, a case need not be characterized or labeled at the outset. Rather, the shape will often emerge after discovery or even at trial. Similarly, the complaint itself need not contain more than the allegation that the adverse employment action was taken because of a protected characteristic. *See Price Waterhouse*, 490 U.S. at 247 n. 12 (plurality opinion).

> Instead, the decision is a result of multiple factors, at least one of which is legitimate.

Price Waterhouse, 490 U.S. at 260 (White, J., concurring in the judgment) (citation omitted).[8] Following the 1991 amendments, characterizing the evidence as mixed-motive instead of single-motive results only in the availability of a different defense, a difference which derives directly from the statutory text, not from judicially created proof structures.

As a practical matter, the question of how many motives the evidence reasonably supports affects the jury instructions as follows:

If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason. 42 U.S.C. § 2000e-2(a); *see also Oncale*, 523 U.S. at 79-80 (emphasizing "because of" standard). If the jury determines that the employer acted because of discriminatory intent, the employee prevails and may receive the full remedies available under Title VII; if not, the employer prevails. In such cases the employer does not benefit from the "same decision"

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[8] Although Justice White used the term "pretext cases" in the first sentence of this passage, it is clear from the context that he was referring to single-motive cases, including those involving pretext. *Id.* at 260.

defense, which, if successful, significantly limits the employee's remedies.

In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII. However, if the jury then finds that the employer has proved the "same decision" affirmative defense by a preponderance of the evidence, 42 U.S.C. § 2000e-5(g)(2)(B), the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions.

Regardless of what kind of instructions are given, we emphasize that there are not two fundamentally different types of Title VII cases. In some cases, the employer may be entitled to the "same decision" affirmative defense instruction. In others, it may not. The employee's ultimate burden of proof in all cases remains the same: to show by a preponderance of the evidence that the challenged employment decision was "because of" discrimination.

Finally, we turn to the question of where the concept of pretext fits in this framework. Although cases in which the *McDonnell Douglas* framework is applied are sometimes referred to as "pretext cases," and we have no wish to change a quarter century of usage, it should be noted that questions of pretext may arise in any Title VII case, regardless of

whether it is analyzed under *McDonnell Douglas*. Cases in which the dispute is only over whether or not the employer possessed the discriminatory motive alleged need not involve pretext, although they often do. For example, if the plaintiff chooses not to invoke the *McDonnell Douglas* framework, the employer need not proffer any explanation for the challenged action, but may simply require the plaintiff to prove her case of discrimination. Nor is the concept of pretext alien to cases in which an employer asserts a "same decision" or "but for" defense. For example, one of the employer's purportedly legitimate reasons may be pretextual. On the other hand, another may not. As Justice O'Connor recently explained in writing for the Court: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination ...." *Reeves*, 530 U.S. at 147.

To summarize: *McDonnell Douglas* and "mixed-motive" are not two opposing types of cases. Rather, they are separate inquiries that occur at separate stages of the litigation. Nor are "single-motive" and "mixed-motive" cases fundamentally different categories of cases. Both require the employee to prove discrimination; they simply reflect the type of evidence offered. Where the employer asserts that, even if the factfinder determines that a discriminatory motive exists, the employer would in any event have taken the adverse employment action for other reasons, it may take advantage of the "same decision" affirmative defense. The remedies will differ if the employer prevails on that defense. With this framework in mind, we turn to the evidence in Costa's case.

II. MIXED-MOTIVE INSTRUCTION AND SUFFICIENCY OF THE EVIDENCE

Although Caesars invokes the *McDonnell Douglas* analysis, that framework is not instructive at this stage of the case. *See Aikens*, 460 U.S. at 713-14. Rather, we are asked to review the district court's decision to give a mixed-motive instruction and the sufficiency of the evidence to support the jury's verdict, as challenged in a motion for judgment as a matter of law made at the close of the evidence.

A. THE MIXED-MOTIVE JURY INSTRUCTION

We must first determine the applicable standard of review. The standards are well known and often stated: we generally review the formulation of instructions for abuse of discretion, but whether an instruction misstates the law is a legal issue reviewed de novo. *See, e.g., Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713 (9th Cir. 2001). At issue here is whether the evidence can be characterized as establishing multiple motives, and thus warranting the affirmative defense. Because this evaluation is, at bottom, an evaluation of the evidence, an abuse of discretion standard is appropriate.

The district court submitted both claims - the termination and the conditions of employment - to the jury. It first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:

> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female.

If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

The jury was next given the following mixed-motive instruction, which is central to this appeal:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the

> defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Caesars first intimates that the wording of the mixed motive instruction was invalid because it inappropriately implied a judicial determination that sex was in fact a motivation for the challenged treatment. Caesars, however, waived any objection to the form of the instruction by conceding at trial that it was "a reasonable statement of the mixed motive instruction." Fed. R. Civ. P. 51; *Shaw v. City of Sacramento*, 250 F.3d 1289, 1293 (9th Cir. 2001) (as amended).

As for Caesars' main contention, we are not persuaded that the district court erred in giving a mixed-motive instruction. In many respects, Costa's case presents a typical Title VII case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different. The evidence did not require the jury to believe that discrimination was the only motive, nor that Caesars' stated reasons were all bogus or pretextual. For example, there was evidence that Hallett, Stewart, and other decisionmakers were legitimately concerned about Costa's behavior and altercations with co-workers, but there was likewise significant evidence that they would not have taken such drastic disciplinary measures against a man. Similarly, the jury could reasonably have concluded that the overtime assignment system was in a state of disarray that allowed favoritism and that one element of that favoritism was preferential treatment for male workers. The fact is that Caesars may have had legitimate reasons to terminate Costa. Indeed, unlike in many Title VII

cases, Costa does not dispute many of the events that took place. Nor does she wholly discount that these events may have been part of the basis for her discipline and termination. Nonetheless, the wide array of discriminatory treatment is sufficient to support a conclusion that sex was also a motivating factor in the decision-making process. Thus, the district court did not abuse its discretion in giving a mixed-motive instruction.

B. SUFFICIENCY OF THE EVIDENCE

We review de novo Caesars' challenge to the district court's denial of its Rule 50(b) motion for judgment as a matter of law. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1226 (9th Cir. 2001), *cert. denied*, 151 L. Ed. 2d 563, 122 S. Ct. 645 (2001). At the outset, we note that the standard that Caesars must meet is very high. We can overturn the jury's verdict and grant such a motion only if "'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.'" *Reeves*, 530 U.S. at 149 (quoting Fed. R. Civ. P. 50(a)). Because we "may not substitute [our] view of the evidence for that of the jury," *Johnson*, 251 F.3d at 1227, we neither make credibility determinations nor weigh the evidence and we must draw all inferences in favor of Costa, *Reeves*, 530 U.S. at 150 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). The Supreme Court cautions us to "disregard all evidence favorable to the moving party that the jury is not required to believe." 530 U.S. at 151. This high hurdle recognizes that credibility, inferences, and factfinding are the province of the jury, not this court.

1. LIABILITY DETERMINATION

Applying the analysis outlined above, we begin, not surprisingly, with the text of the statute, asking whether a reasonable jury could conclude that sex was "a motivating factor" in the challenged actions. The discriminatory treatment ran the gamut from disparate discipline and "stacking" Costa's personnel file to stalking her, singling her out for different treatment in the workplace, and discriminating against her in the assignment of overtime. In the final analysis, the jury heard testimony from Costa and fifteen other witnesses. Testimony included the chronology of escalating discipline and targeting of Costa, co-workers who identified discrimination because of sex, and multiple examples of disparate treatment purposefully directed at Costa because of her sex. Lending credence to the claim that sex was a motivating factor in her treatment, Costa also offered evidence of sexual stereotyping and sexual epithets. Viewing the evidence from her perspective and drawing all inferences in her favor, we cannot conclude that "there is no legally sufficient evidentiary basis for a reasonable jury," *Reeves*, 530 U.S. at 135, 149, to find that intentional discrimination on the basis of sex was "a motivating factor" in subjecting Costa to a number of adverse employment actions, and culminating in her termination.

Costa presents overwhelming evidence that she was more harshly treated than her male coworkers. Because she was the only woman in an otherwise all-male unit, linking the differential treatment to her sex was not a difficult leap. The jury could easily infer that sex was one of the reasons Costa was singled out for negative treatment. Indeed, the evidence is sufficiently strong that for many of the incidents the jury

might have concluded that sex was the only reason for the adverse action. "Proof of discriminatory motive ... can in some situations be inferred from the mere fact of differences in treatment." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). Mindful of the Supreme Court's admonishment to "draw all reasonable inferences in favor of" the prevailing party, *Reeves*, 530 U.S. at 151-52, we conclude that the jury was entitled to view the differential treatment here as evidence of discrimination.

In a case quite similar to this one, *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104, 1112 (9th Cir. 1991), we held that a plaintiff had made a showing sufficient to create a factual issue. The plaintiff there, the only woman holding a full-time faculty appointment in the art department of a community college, alleged that she was denied a choice as to which courses to teach and that she was deprived of supplies, whereas male co-workers were not. The college was also nonresponsive to reasonable requests for leave and disciplined her for petty offenses. *Id.* at 1107-08. Similarly, Costa presented evidence that she was denied overtime and medical leave where male co-workers were not. Her work was supervised more intensely than that of male colleagues. She was reprimanded for minor infractions while men, sitting right next to her and engaging in the same conduct, were not. Thus, this is a case where "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311-12, 13 L. Ed. 2d 855, 85 S. Ct. 955 (1965) ("Where many have broken a shop rule, but only union leaders have been discharged, the Board need not listen

too long to the plea that shop discipline was simply being enforced.").

The most prominent example of this differential treatment was Caesars' decision to terminate Costa for an incident that netted her male co-worker only a five-day suspension. Costa's claim that she was shoved against an elevator wall and sustained bruises from the altercation is not one to be taken lightly. The excuse that the management could not figure out whom to believe - Costa or Gerber - is questionable given the strong corroboration of Costa's story and the inconsistencies in Gerber's account. The explanation offered by Caesars was lacking in several respects, and the jury was certainly not required to believe it. The jury was entitled instead to infer that Costa was fired, while Gerber was only suspended, because Costa was a woman. This is precisely the circumstance in which we credit the inference in Costa's favor.

Finally, the jury could easily have believed that Costa's record was itself largely a result of discrimination because of repeated incidents of unfair discipline that accumulated over time. For example, her supervisor's decision to backfill the records with prior alleged misconduct supports such a conclusion. *See Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991). In *Pogue*, we held that the Department of Labor acted, at least in part, with impermissible retaliatory motives, because the employee's "prior work performance and defiant attitude cited by the Secretary could reasonably be attributed to the Navy's admitted retaliation." *Id.* Moreover, "Pogue presented evidence, relied on by the ALJ, that the disciplinary actions

taken against her were substantially disproportionate to discipline imposed by the Navy in the past." *Id.*

Caesars presents us with alternate rationales for the termination, and asks us to hold as a matter of law that Costa's conduct was the only element motivating its decision. We decline this invitation. Perhaps the disparities in how Costa was treated were in part because supervisor Hallett disliked her as a person and not as a woman. Perhaps they were in part because Costa had a history of "not getting along" with her co-workers, although there was contrary testimony. What the jury implicitly concluded, however, was that the disparities were also in part because she was a woman. In so finding, the jury did not necessarily reject all of Caesars' legitimate complaints about Costa. But even if it credited certain of these explanations, in following the jury instructions, it reasonably found that sex was "a motivating factor" in the termination. The evidence of differential treatment was so persuasive and long-standing that the judgment may be upheld on this ground alone. "It is primarily the province of the jury to determine what inferences can be drawn from circumstantial evidence. So long as the evidence can reasonably support an inference of discrimination, the court should not upset the jury's decision." *Norton v. Sam's Club*, 145 F.3d 114, 119 (2d Cir. 1998).

We turn next to Costa's evidence that she was chastised for failing to conform to the role stereotypically assigned to women. The jury heard remarks that could reasonably be viewed to "stem[]from an impermissibly cabined view of the proper behavior of women." *Price Waterhouse*, 490 U.S. at 236-37. She was told that she did not deserve overtime because she did not have a family to

support. In her view, the implication was that she was not *a man* with a family to support. The jury could interpret this as a comment directed to her as a woman, indicating that the discriminatory action, a failure to assign overtime, was based on her not being a male breadwinner. The Seventh Circuit held similar facts to be evidence of sex stereotyping. *See Bruno v. City of Crown Point*, 950 F.2d 355, 362 (7th Cir. 1991) (holding that jury could believe employer held sexual stereotypes when female paramedic applicant was the only one asked about family responsibilities).

She was also disciplined in circumstances that the jury could reasonably infer amounted to telling her to "walk more femininely, talk more femininely." *Price Waterhouse*, 490 U.S. at 235. For example, Costa was told "you got more balls than the guys." And yet, arguably when she acted tough like the guys, she received harsher discipline rather than an "atta boy" reinforcement. At trial, Caesars' consistent objection to Costa as an employee was that she was "strong-willed" and "opinionated," a view that the jury could have reasonably interpreted as gender stereotyping. As was clear from her testimony, Costa sought no special treatment, only equal treatment.

Finally, reinforcing the inference that her gender motivated the adverse view of her character, Costa presented evidence of sexual language and epithets directed to her. Specifically, Costa presented evidence that Hallett, the very supervisor who signed her discharge, had declared an intention on several occasions to "get rid of that bitch." Whether this term is part of the everyday give-and-take of a warehouse environment or is inherently offensive is not for us to say. Instead, we simply conclude that the jury could

interpret it here to be one piece of evidence among many, a derogatory term indicating sex-based hostility.[9] In addition, managers encouraged sex-based epithets directed at Costa by disciplining her for failing to tolerate the slurs silently. Admittedly, Costa worked in a rough and tumble and often vulgar environment. But the prevalence of race or sex-based slurs does not excuse them. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001), *cert. denied*, 152 L. Ed. 2d 623, 122 S. Ct. 1609 (2002).

As we explained in *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994), when abuse directed at women "centers on the fact that they [are] females," a jury may infer discrimination. In *Steiner*, a hostile environment case, a supervisor "was indeed abusive to men, but ...his abuse of women was different. It relied on sexual epithets, offensive, explicit references to women's bodies and sexual conduct." *Id.* at 1463 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 19, 126 L. Ed. 2d 295, 114 S. Ct. 367

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[9] *See Galloway v. Gen'l Motors Serv. Parts Operations*, 78 F.3d 1164, 1168 (7th Cir. 1996) (holding that the legal meaning of the word "bitch" is context-specific; "The word 'bitch' is sometimes used as a label for women who possess such 'woman faults' as 'ill-temper ...,' and latterly as a label for women considered by some men to be too aggressive or careerist." (citation omitted)), *overruled in part on other grounds by AMTRAK v.* Morgan,153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (noting that use of the word "bitch" might be evidence of discrimination in some contexts); *Neuren v. Adduci, Mastriani, Meeks & Schill*, 310 U.S. App. D.C. 82, 43 F.3d 1507, 1513 (D.C. Cir. 1995) ("This pejorative term may support an inference that an employment decision is discriminatory under different circumstances ....").

(1993)). Similarly here, the evidence supports the inference that the abuse directed toward Costa was different in nature and degree.

In the context of this case, we need not decide whether this sexual language is dispositive of discrimination. Rather, this language was simply one more factor for the jury to consider in the face of repeated differential treatment by Hallett and others at Caesars. Viewing the evidence in Costa's favor, the jury could have easily inferred that the use of highly charged and offensive sexual language was simply another means of singling Costa out because she was a woman.

Finally, we detour briefly to address the suggestion that Hallett was somehow incapable of discriminating against Costa because Hallett was herself a woman. This argument was resoundingly rejected by a unanimous Supreme Court in *Oncale*, 523 U.S. at 80-81. In a society where historically discriminatory attitudes about women are "firmly rooted in our national consciousness," *Frontiero v. Richardson*, 411 U.S. 677, 684, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) (plurality opinion), we cannot discount that the jury perceived Hallett, a former Army officer now placed in a supervisory position in a virtually male-only world, as demonstrating hostility toward Costa as a woman as a means of showing that she was "one of the boys." *See also J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 136-37, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994) ("Our nation has had a long and unfortunate history of sex discrimination ....") (quoting *Frontiero*, 411 U.S. at 684). Life was not necessarily easy for Hallett, but that was no excuse for visiting harsh discipline on Costa.

2. AFFIRMATIVE DEFENSE - "SAME DECISION"

Once the jury found liability on the part of Caesars, it was asked to decide whether the "defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision." The jury checked the "NO" box. This question on the special verdict form reflects the "same decision" affirmative defense provided in 42 U.S.C. 2000e-5(g)(2)(B); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759-60 (9th Cir. 1996).

Caesars, not Costa, has the burden on this question, and we must still filter the evidence in the light most favorable to Costa. Under this lens, much of the evidence of differential treatment removes this question from the realm of the hypothetical and shows what, in fact, Caesars did do when men violated its policies. Costa's infractions may have played a role in her termination. But the evidence also underscores how the documentation of her infractions and discipline stemmed in part from sex discrimination. Based on the extensive testimony, the jury simply did not believe that Caesars would have made the same decision "but for" Costa's sex. There was a substantial basis for the jury to conclude that Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex.

III. ADMISSIBILITY OF ARBITRATION DECISIONS

Caesars argues that the trial court's exclusion of arbitration decisions, relating to the incident that ultimately triggered Costa's termination, was an abuse of discretion so

prejudicial that a new trial is warranted. The incident that led to Costa's termination was the altercation with Gerber in the elevator. In an arbitration brought pursuant to their collective bargaining agreement, both Costa and Gerber challenged the discipline imposed, to no avail. At the discrimination trial, having successfully argued that hearsay rules blocked Costa's attempt to introduce transcripts of the arbitration hearing, Caesars later sought to introduce the arbitrator's decisions. Costa responded by raising a hearsay objection and arguing that admission of the decisions would be irrelevant because the central issue of the trial - sex discrimination - was not addressed in the arbitration.

Costa is correct that discrimination was not covered by the collective bargaining agreement and was not at issue in the arbitration. Thus, the present case can be distinguished from *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 38, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), in which the Supreme Court established an employee's right to pursue both Title VII judicial remedies and arbitration "under the nondiscrimination clause of a collective-bargaining agreement." Because we review for abuse of discretion the narrow evidentiary issue before us, we need not address the scope of *Gardner-Denver* or broader issues with respect to the preclusive effects of arbitration on subsequent discrimination claims. *See, e.g, Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). Other courts have held that district courts have discretion to exclude arbitration awards in similar circumstances. *See, e.g. Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (8th Cir. 1994); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1259 (10th Cir. 1988); *Perry v. Larson*, 794 F.2d 279, 284-85 (7th Cir. 1986). Under these circumstances, it was not an abuse of discretion for the

district court to exclude the arbitration decisions. *See United States v. Hernandez- Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001) (standard of review).

IV. PUNITIVE DAMAGES

The jury awarded $100,000 in punitive damages, in addition to the $200,000 in compensatory damages (later remitted to $100,000) and $64,377.74 in backpay. Caesars argues that the jury instruction on punitive damages, though a proper statement of Ninth Circuit law at the time of trial, was in fact in error under the Supreme Court's later ruling in *Kolstad v. American Dental Association*, 527 U.S. 526, 144 L. Ed. 2d 494, 119 S. Ct. 2118 (1999). We agree and accordingly remand for consideration of punitive damages.

We have explained that *Kolstad* provided the employer with a new "good faith" defense, enabling it to escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer's good faith implementation of an effective antidiscrimination policy. *Swinton*, 270 F.3d at 810-11; *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 516 (9th Cir. 2000). *Kolstad* also suggests that "'the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished.'" 527 U.S. at 543 (quoting 1 L. Schlueter & K. Redden, Punitive Damages § 4.4(B)(2)(a), p. 181 (3d ed. 1995)). Understandably, in view of the then-current Ninth Circuit authority, the instructions here contained no such

considerations, nor were these issues considered by the district court.[10]

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[10] Caesars objected to Instruction Number 15, which was a general vicarious liability instruction:

> A corporation such as Caesars Palace acts through its management and it is responsible for the decisions and actions of its management and supervisory personnel in matters of this kind.

Instruction Number 13 related to punitive damages and read, in relevant part:

> If you find for plaintiff and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.
>
> Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Plaintiff has made a showing beyond the threshold level of intent required for compensatory damages. An award of punitive damages is proper where defendant's illegal acts were willful and egregious, or displayed reckless disregard to plaintiff's rights. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

Initially, we must determine whether Caesars waived the objection to the form of the instruction by failing to raise it at trial. We have discretion to review an instruction despite such a failure to object where a "'solid wall of Circuit authority' would have rendered an objection futile." *Knapp v. Ernst & Whinney*, 90 F.3d 1431, 1438-39 (9th Cir. 1996) (quoting *Robinson v. Heilman*, 563 F.2d 1304, 1307 (9th Cir. 1977) (per curiam)). Consistent with our prior cases in this transitional period, we believe that review is appropriate to determine whether the jury instructions comported with the Supreme Court's command in *Kolstad*. *See Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1291 (9th Cir. 2001); *Swinton*, 270 F.3d at 809-10; *Passantino*, 212 F.3d at 514.

Both parties seek to avoid a remand on the punitive damages issue. Costa argues that the jury's finding of egregious conduct obviates the need to determine good faith; Caesars argues that punitive damages are unavailable as a matter of law. Neither argument prevails. The jury found the conduct "egregious" or reflective of "complete indifference to the safety and rights of others." *Kolstad* held that "egregious" misconduct was probative but not necessary for an award of punitive damages. 527 U.S. at 538. Instead, the question was the employer's "malice" or "reckless indifference" to the employee's federally protected rights. *Id.* at 535-36. The jury's findings, which were well-supported, establish this requisite scienter and the additional, probative factor of egregious misconduct. However, we cannot equate "egregious" misconduct with a lack of "good faith" as a matter of law. Nor can we say that punitive damages are unavailable as a matter of law. We therefore remand for a retrial on the issue of punitive damages in light of *Kolstad*.

AFFIRMED in part; **REVERSED** and **REMANDED** in part. Each party to bear its own costs on appeal.

DISSENT

GOULD, Circuit Judge, with whom KOZINSKI, FERNANDEZ, and KLEINFELD, Circuit Judges, join, dissenting:

I respectfully dissent because the majority does not follow the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), in Title VII mixed motives cases. The majority's analysis is not persuasive and should be corrected because it disregards the holding of *Hopkins* that is reflected in Justice O'Connor's concurring opinion.

In *Hopkins*, the plurality, comprised of four Justices, concluded that an employee should be able to recover under Title VII if gender was "a factor in the employment decision at the moment it was made," 490 U.S. at 241, unless the employer, using objective evidence, could show by a preponderance of the evidence that it would have made the same decision absent the discriminatory motive. *Id.* at 244-45, 252.

Justice White, joined by Justice O'Connor, concurred in the judgment. Justice White thought that the impermissible motive must have been a "substantial factor" in the employer's decision and that the employer need not use "objective evidence" to make its same-decision showing. *Id.* at 259, 261. Justice White would permit a mixed motive test in which the burden is shifted to the employer, but he would

be liberal on the evidence an employer could offer. His view of when such a test should be available, however, is broader than Justice O'Connor's.

Justice O'Connor would allow a plaintiff to use a mixed motive test only in narrow circumstances. In concurrence, Justice O'Connor held that she would require a Title VII plaintiff in a mixed motive case to produce "direct evidence" showing that "decisionmakers placed substantial negative reliance on [the] illegitimate criterion," *id.* at 277.

I do not point to Justice O'Connor's concurring opinion merely to admire its common sense, though that is admirable. Rather, we must heed the direct evidence rule of *Hopkins* as controlling, and we may not diminish it, in the majority's terms, as a "passing reference." Justice O'Connor's concurring opinion in *Hopkins*, which in considered language required the use of direct evidence to prove a mixed motive case, must be viewed as the holding of the Court, under the rule of *Marks v. United States*, 430 U.S. 188, 193, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....") (citation and internal quotation marks omitted).

Because Justice O'Connor would permit the use of the mixed motives test only when direct evidence is present, Justice O'Connor "concurred in the judgment on the narrowest grounds," *see Marks* 430 U.S. at 193, and her concurrence is to be considered the holding of *Hopkins* under

the rule described in *Marks*. The view that Justice O'Connor's opinion is the holding in *Hopkins* is supported by Congress' actions in amending Title VII in 1991, by the holdings of other circuits on the issue, and by sound policy.

The 1991 amendments to Title VII did not modify the Supreme Court's prior holding on the need for direct evidence. Subsection (m) of 42 U.S.C. § 2000e-2, which incorporates the premise of *Hopkins* that discrimination can be shown in a mixed motive case so long as it is one factor, was enacted two years after *Hopkins*:

> Except as otherwise provided in this subchapter [42 U.S.C. § § 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). Though Congress responded to other aspects of the Court's holding in *Hopkins*, specifically the holding that an employer could completely avoid liability if it could show that it would have made the same decision absent the discriminatory motive, *see* 42 U.S.C. § 2000e-5(g)(2); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), Congress, in amending Title VII, did not respond at all to Justice O'Connor's direct evidence requirement, which had already been adopted by several circuit courts. Instead, the statutory amendments are silent as to that subject, neither praising nor condemning, neither adopting nor rejecting, and clearly not modifying Justice O'Connor's test, which is

properly viewed as the holding of *Hopkins*. This silence indicates that Congress left undisturbed Justice O'Connor's holding and the prior circuit decisions that adhered to it. As we remain bound by the Supreme Court's precedent, we must follow the direct evidence rule as explained in Justice O'Connor's concurrence.

By vitiating Justice O'Connor's direct evidence requirement, the majority's holding puts our circuit in conflict with almost all others. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990). As suggested in the decision of the three-judge panel in *Costa*, and as reflected in the cases cited above, these circuits have correctly viewed Justice O'Connor's opinion in *Hopkins* as the holding of the Court and have followed it on that basis. *See Costa v. Desert Palace, Inc.*, 268 F.3d 882, 886-88 (9th Cir. 2001), vacated by 274 F.3d 1306 (9th Cir. 2001). I agree with the other circuits and with the reasoning of the prior opinion of the three-judge panel in *Costa*, which I adopt because it is faithful to precedent.[1] We should not rush to join

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[1] The three-judge panel held that:

a decision that turns its back on our colleagues' wisdom and engages our circuit in a fanciful frolic of its own.

Finally, apart from our duty to abide by precedent, policy concerns favor adhering to Justice O'Connor's view of mixed motives analysis. Mixed motives analysis is a departure from the well-established *McDonnell Douglas* framework. Whereas *McDonnell Douglas* requires the plaintiff to make a

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Even if Costa's evidence of differential treatment were found to raise an inference of discrimination, it does not "prove that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258, 109 S. Ct. 1775 (plurality opinion); *see also* 490 U.S. at 280, 109 S. Ct. 1775 (O'Connor, J., concurring) ("I read [today's decision] as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons."). Costa's case comes down to the fact that she was the only woman in her workplace and that in some instances she was treated less favorably than her male coworkers. But she has failed to produce evidence that she was treated differently *because* she was a woman -"direct and substantial evidence of discriminatory animus." Accordingly, the district court erred in giving the jury a mixed-motive instruction. Because the court's instructions shifted the burden of proof to Caesars, the error was not harmless. *See Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Caesars was prejudiced, moreover, by the court's instruction that the jury had "heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex," a statement not supported by the record. Accordingly, the judgment must be vacated.

Costa, 268 F.3d at 889-90 (footnotes omitted).

pretext showing once an employer puts forth evidence of legitimate nondiscriminatory reasons for the challenged employment practice, mixed motive analysis allows a plaintiff to prevail even when she cannot prove pretext.

To keep the mixed motive framework from overriding in all cases the *McDonnell Douglas* rule and the pretext requirement, which it clearly was not meant to do, mixed motive analysis properly is available only in a special subset of cases. Justice O'Connor's direct evidence requirement meets this need: It requires the plaintiff to produce highly probative, direct evidence, before she may utilize the more lenient, mixed motives test. As a practical matter, without this or some similar constraint on when a plaintiff may invoke the mixed motives test, any plaintiff would opt for the *Hopkins* framework to avoid having to show pretext. The Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of *Hopkins* that jettisons the direct evidence requirement, an effect that could not have been intended in *Hopkins* and an effect that will create uncertainty in our settled law.

Taken with the idea that plaintiff, an unsatisfactory employee, is a "trailblazer," the majority departs from the path of precedent and blazes its own trail beyond the frontiers of settled law into regions of error. I respectfully dissent.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-15645
D.C. No. CV-96-00009-DWH/RJJ

[Filed October 2, 2001]

CATHARINA F. COSTA,
Plaintiff-Appellee,

v.

DESERT PALACE, INC., dba
Caesars Palace Hotel & Casino,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Nevada David Warner Hagen,
District Judge, Presiding

Argued and Submitted
September 13, 2000--Portland, Oregon

JUDGES:
Before Alex Kozinski and Andrew J. Kleinfeld, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Opinion by Judge Schwarzer

ORDER

The panel has voted unanimously to withdraw the Opinion filed December 29, 2000.

The petition for rehearing is DENIED.

OPINION

SCHWARZER, Senior District Judge:

The central question before us is whether the district court erred in giving a mixed-motive instruction to the jury considering plaintiffs claim of discriminatory working conditions and wrongful discharge. We conclude that in the absence of substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus, the giving of a mixed-motive instruction was reversible error.

FACTUAL AND PROCEDURAL BACKGROUND

Catharina Costa was employed by Caesars Palace Hotel & Casino (Caesars) as a warehouse worker from 1987

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

to 1994. She was the only woman in the bargaining unit covered by a collective bargaining agreement (CBA) between Caesars and Teamsters Local 995. A long history of disciplinary infractions and suspensions culminated in her termination in 1994, following a verbal and physical altercation with a fellow worker, Herbert Gerber. While Costa was fired, Gerber, a twenty-five year employee with a good disciplinary record and no prior suspensions, received only a five-day suspension. Both employees filed grievances under the CBA. An arbitrator sustained both disciplinary actions and found that Caesars had just cause to terminate Costa.

Costa filed this action alleging gender discrimination in connection with the conditions of her employment and her termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994) [hereinafter Title VII].[1] The jury returned a verdict for Costa, awarding $64,377 for financial loss, $200,000 in compensatory damages, and $100,000 in punitive damages. The court denied Caesars' motion for judgment as a matter of law but granted its motion for new trial or remittitur, conditioned on Costa's acceptance of a reduction of compensatory damages to $100,000. The court also awarded attorney's fees of $56,298 and judgment was entered accordingly. Caesars appeals. We have jurisdiction under 28 U.S.C. § 1291, and vacate the judgment on the conditions of employment claim, reverse on the termination claim; and remand for further proceedings consistent with this opinion.

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[1] Her state law claims were dismissed before trial.

DISCUSSION

I. THE MIXED-MOTIVE JURY INSTRUCTION

The district court submitted both the termination and the conditions of employment claims to the jury. It first instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female. If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

It then went on to give the following instruction, which is the central issue in this appeal:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiffs sex and also by other lawful reasons. If you find that the plaintiffs sex was a motivating factor in the defendant's treatment

of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiffs gender had played no role in the employment decision.

Caesars' principal contention on appeal is that the district court erred by giving the jury a *Price Waterhouse* mixed-motive instruction rather than a *McDonnell Douglas* pretext instruction. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). It objected to the instruction at trial and offered a *McDonnell Douglas* pretext instruction, which the court rejected.

"Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996). Generally, we review the formulation of instructions for abuse of discretion. *See Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1046 (9th Cir. 1998). However, "[i]f the instructions are challenged as a misstatement of the law, they

are then reviewed *de novo." Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) (citation and internal quotation marks omitted). Although the instruction did not misstate the law, Caesars argues that it was legal error to give it on the basis of the evidence presented at trial.

A Title VII employment discrimination claim may proceed on either a single-motive (or pretext) theory or a mixed-motive theory. In a pretext case, an employee must first make out a prima facie case of discrimination. If the employee succeeds, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802. If the employer makes that showing, the presumption raised by the prima facie case is rebutted and the burden of production then shifts to the employee to show that the employer's reason was pretext and the real reason was discriminatory. That burden merges with the ultimate burden of persuading the trier of fact that the employee has been the victim of intentional discrimination. *See Tex. Dep't of Cmty. Affairs v. Bur-dine*, 450 U.S. 248, 254-56 (1981).

In contrast, in a mixed-motive case, proof proceeds in two steps. First, the plaintiff must prove that"an impermissible motive played a motivating part in an adverse employment decision." *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). Second, once "a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiffs gender into account." *Id.* at 258 (plurality opinion).

We have not heretofore addressed directly what evidentiary burden a plaintiff must satisfy to prove her gender was a motivating factor in an adverse employment action.[2] Our sister circuits have dealt with this issue and, though not in identical language, have all reached the conclusion that evidence that merely raises an inference of discrimination from differential treatment is not sufficient to shift the burden to the defendant. *See Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (lst Cir. 1990) ("If a plaintiff can provide direct evidence that gender bias infected the decision making process, the *Burdine* framework becomes irrelevant and the burden shifts to defendant .... Direct evidence is evidence which, in and of itself, shows a discriminatory animus."); (*Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171,182 (2d Cir. 1992) ("[T]hough sufficient proof that the forbidden factor played a 'motivating role' to entitle the plaintiff to a burden shifting instruction may be furnished through circumstantial evidence, that circumstantial evidence must be tied directly to the alleged discriminatory animus .... If the plaintiffs nonstatistical evidence is directly tied to the forbidden animus, for example, policy documents or statements of a person involved in the decision making process that reflect a discriminatory or retaliatory animus of the type complained of in the suit, that plaintiff is entitled to a burden-shifting instruction."); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995) ("In a 'mixed motives' or *Price Waterhouse* case, the employee must produce direct evidence of discrimination, i.e., more direct evidence than is

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[2] *Sischo-Nownejad v. Merced Community College District*, 934 F.2d 1104 (9th Cir. 1991), on which Costa relies, was a single-motive case decided under the *McDonnell Douglas* framework. *See id.* at 1110.

required for the *McDonnell Douglas/Burdine* prima facie case."); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed motive instruction ... requires "direct evidence that decision makers placed substantial negative reliance on an illegitimate criterion,'" quoting *Price Waterhouse*, 490 U.S. at 277, O'Connor, J., concurring); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858,861 (5th Cir. 1993) ("When a plaintiff presents credible direct evidence that discriminatory animus in part motivated or was a substantial factor in the contested employment action, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor. Direct evidence is evidence which, if believed, proves the fact without inference or presumption."); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991) ("Under *Price Waterhouse*, such a burden on the defendant only arises where the plaintiff presents direct evidence that unlawful discriminatory animus was a substantial motivation for the adverse action."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343,347 (7th Cir. 1997) ("Two methods exist for Plair to satisfy his burden of proof: by direct evidence that racial discrimination motivated Brash's decision to terminate him, or by the indirect, burden-shifting method of *McDonnell Douglas Corp. v. Green* .... '[D]irect evidence' is defined as evidence which 'if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption.'"); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991) ("A mixed motive case exists either when (1) the employer "concedes that age was a discernible factor, but not a motivating one, for the employment decision' or (2) the "trial court finds that a discriminatory reason was a discernible factor in the

employer's decision-making process.'... Simply because a discriminatory reason might be inferred from a prima facie case does not mean that a mixed motive case exists."); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993) ("At best, it is only arguable that a discriminatory intent to keep Ms. Heim in the office be inferred from the statement. This type of inferential statement is not 'direct evidence' of discrimination satisfying the plaintiffs burden."); *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) ("In a direct evidence case, the plaintiff must produce direct testimony that the employer acted with discriminatory motive, and must convince the trier of fact to accept the testimony .... If the plaintiff produces such evidence and the trier of fact believes it, the defendant must prove by a preponderance of the evidence that the defendant would have reached the same decision without the factor proved."); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997) ("Burden-shifting under *Price Waterhouse* requires 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'").[3]

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[3] The use of terms such as "direct" evidence should not be read as limiting the *type* of evidence a plaintiff such as Costa must present in order to receive a mixed-motive instruction. Rather, it is directed at the greater *quantum* of evidence required to establish a mixed-motive case. The reason for the distinction is that in a mixed-motive case the burden of proof shifts to the defendant once the plaintiff has produced sufficient evidence, while in a pretext case the burden always remains with the plaintiff. *See Price Waterhouse*, 490 U.S. at 258.

Costa contends that "the evidence [she] presented showed that Costa was definitely being treated differently than her male co-workers and a reasonable mind could conclude that it was because she was a woman." But of the incidents she relates, only two bear even a remote connection to gender: (1) an allegedly discriminatory assignment of overtime hours, and (2) a supervisor's comment referring to Costa as a "bitch."

With respect to the overtime claim, Costa first testified that when she confronted her supervisor about why Mark Dudenake, a male coworker, received more overtime, "I was flat out told he's a man and has a family to support." On cross-examination, however, Costa retracted this testimony, admitting that her supervisor had not used the word "man." The supervisor's statement was gender neutral, and Costa has failed to show that it establishes either that Dudenake received extra overtime *because* he was male, or that Costa was denied overtime *because* she was female. Indeed, it is undisputed that Dudenake had a family to support while Costa did not. Comments motivated by consideration of parental or marital status do not establish gender bias, and neither status is protected under Title VII. *See Bruno v. City of Crown Point*, 950 F.2d 355,362-63 (7th Cir. 1991).

Costa also points to testimony of Jeff Graham, a male coworker, that Assistant Warehouse Manager Karen Hallett (allegedly one of three decisionmakers in Costa's termination) told him that she "wanted to get rid of that bitch," in reference to Costa. The use of the word "bitch," she argues, directly reflects that gender was a "motivating factor" in her termination. Graham further testified, however, that Hallett told him that she wanted to get rid of Costa because she"did

not like the way that Catharina did her job" and because Costa was not a "team player." Other employees testified to personal animosity between Costa and Hallett, possibly exacerbated by Costa's role as union steward during a period of contentious labor relations. Testimony also showed that Hallett's aggressive management style offended other warehouse employees, both male and female. In this context, Hallett's use of the word "bitch" does not show discrimination because of Costa's gender. *See Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 342-43 (6th Cir. 1998) (use of word "bitch" by supervisor who made it known that he disliked plaintiff and used her as the butt of office jokes is consistent with personal dislike rather than discriminatory animus); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (use of the word "bitch" is not an indication of general misogynist attitude where term was directed toward only one woman rather than women in general and was, therefore, not particularly probative of gender discrimination).

Costa's other evidence consists of various grievances about her treatment by Caesars, including a number of incidents in which she claims that she was treated differently from her male coworkers. Thus, she claims to have received warnings for tardiness and absenteeism not given to men, to have been asked by a supervisor while on an unscheduled break whether she had work to do when men were not, to have been forced to sign a United Way card when men were not, to have been written up for unsafe operation of a forklift when men were not, to have been suspended for using vulgar language when men were not, to have been excluded from an office where men were taking a break, to have been followed by her supervisor when men were not, and, finally, to have

been terminated for an altercation with a coworker who was not terminated.

Even if Costa's evidence of differential treatment were found to raise an inference of discrimination, it does not "prove that her gender played a motivating part in an employment decision." *Price Waterhouse*, 490 U.S. at 258 (plurality opinion); *see also id.* at 280 (O'Connor, J., concurring) ("I read [today's decision] as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons.").[4] Costa's case comes down to the fact that she was the only woman in her workplace and that in some instances she was treated less favorably than her male coworkers. But she has failed to produce evidence that she was treated differently *because* she was a woman--"direct and substantial evidence of discriminatory animus." Accordingly, the district court erred in giving the jury a mixed-motive instruction.[5] Because the court's instructions shifted the

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[4] In *Price Waterhouse*, the trial judge had found that some of the firm's partners' remarks about plaintiff "stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments." 490 U.S. at 236-37. Notably, one male partner advised her that in order to improve her chances of making partner she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

[5] The 1991 amendment to the Civil Rights Act do not alter the substantive analysis under *Price Waterhouse*, but provides a

burden of proof to Caesars, the error was not harmless.[6] *See Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992). Caesars was prejudiced, moreover, by the court's instruction that the jury had "heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiffs sex," a statement not supported by the record. Accordingly, the judgment must be vacated.

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nonmonetary remedy against discriminatory practices even where the employer establishes the affirmative defense. See 42 U.S.C. § 2000e-5(g)(2)(B). As the Second Circuit has held, the amendment "modifies *Price Waterhouse* by akering the legal consequences of a successful showing by the defendant on its affirmative defense." *Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997); *see also Watson v. Southeastem Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir. 1992) ("[T]he Civil Rights Act of 1991 does not address our biggest problem: whether *Price Waterhouse* requires the plaintiff to show 'direct evidence' of discrimination as a precondition to shifting into mixed-motive analysis.")

[6] The case was submitted to the jury on a verdict form asking the jury, in substance: (1) whether "[p]laintiffs gender (sex) was a motivating factor in any adverse condition of employment," (2) whether "defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)," and (3) if so, whether "defendant has proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiffs gender had played no role in the employment decision."

II. CAESARS' MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE TERMINATION CLAIM

Caesars contends that the district court erred in denying its motion for judgment as a matter of law on Costa's termination claim.[7] We review the district court's decision *de novo*, and reverse only if the evidence, viewed in the light most favorable to the prevailing party, admits only of a contrary conclusion. *See Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493,506 (9th Cir. 2000). If we conclude that the district court erroneously denied a motion for judgment as a matter of law, we may reverse and direct the court to enter a judgment as a matter of law. *See Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967).

Costa asserts that she "pled and presented this case upon the 'mixed-motive' method of proving disparate treatment." At no point during the litigation did she seek to

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[7] Caesars twice moved during trial for judgment as a matter of law on all of Costa's claims. The district court denied the motions. After trial, Caesars moved for judgment as a matter of law solely on Costa's termina tion claim and the award of punitive damages. The court again denied the motion. Because Caesars has limited both its Rule 50(b) motion and its assignment of error on appeal to the termination claim, we are not free to consider whether the motions should have been granted on both of Costa's claims. We note, however, that because Costa's entire case was presented solely as a mixed-motive case, our analysis with respect to the sufficiency of the evidence to support such a case, in section I of this opinion, would be dispositive of Costa's claim of discriminatory conditions of employment as well as her termination claim. We assume that the district court will be guided by that analysis on remand.

raise a pretext claim. The issue before us, therefore, is whether she presented substantial evidence of conduct or statements by persons involved in the decision to terminate her that directly reflects gender-based animus. Costa contends that her termination was the culmination of the disparate treatment she received and that men were treated differently from her in the application of discipline, up to and including termination. She points to the fact that although the altercation with Gerber precipitated her termination, he received only a five-day suspension. Even if these circumstances were found to raise an inference of discrimination, Costa points to no evidence that gender played a part in the decision--that she was terminated because she was a woman. See discussion at pp. 14065-68, *supra*. With respect to the termination claim, therefore, the judgment must be reversed.[8]

III. CAESARS' OTHER CONTENTIONS

Caesars contends that the district court erred in excluding the arbitrator's decision upholding Costa's termination. Because Caesars is entitled to judgment as a matter of law on the termination claim, and the arbitrator's decision is relevant solely to that claim, we need not address the issue.

Caesars further contends that it is entitled to judgment as a matter of law on the punitive damages claim, citing *Kolstad v. American Dental Association*, 527 U.S. 526 (1999). The district court's damage instruction (# 13) and its

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[8] Costa's petition for rehearing did not specifically challenge the panel's decision reversing the judgment on the termination claim.

vicarious liability instruction (# 15) did not take into account the decision in *Kolstad*, handed down after the judgment became final. On remand, the court should apply *Kolstad* to the extent it may be appropriate. *See Passantino*, 212 F.3d at 514.

CONCLUSION

Because the evidence did not support the giving of the mixed-motive instruction on Costa's claim of gender discrimination, the district court erred and the judgment is vacated. Because the evidence did not support the giving of a mixed-motive instruction on the wrongful termination claim, the motion for judgment as a matter of law on that claim should have been granted and the judgment as to that claim is reversed. We remand for further proceedings consistent with this opinion.

VACATED in part; REVERSED in part; and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-96-9-DWH(RJJ)

[Filed January 28, 1999]

CATHARINA COSTA,
Plaintiff,

v.

DESERT PALACE, INC. dba CAESARS PALACE HOTEL & CASINO, et al.,
Defendants.

ORDER

Before the court are plaintiff's motions for attorneys' fees and costs (#82) and to review the clerk's taxation of costs (#90) and defendant's motions for judgment as a matter of law (#87) and for a new trial or remittitur (#87).

I. Factual and Procedural Background

Plaintiff was hired in February 1987 by defendant Desert Palace, Inc. dba Caesars Palace Hotel & Casino ("Caesars") as the only female warehouse person in the food

and beverage warehouse. In her complaint, plaintiff alleged that she was treated differently from her male co-workers on the basis of her sex in the following ways: plaintiff was warned for absenteeism even though she had a written doctor's statement explaining her absence while male co-workers who had several unexcused absences were not so warned; she was issued a record of counseling for tardiness while her male co-workers who arrived late were not written up; she was never permitted to work overtime while her male co-workers were so permitted; she received an unwritten reprimand for "eating soup on a non-regular break" while male co-workers who were eating soup with plaintiff were not reprimanded; she was suspended for 30 days for allegedly using profanity and ethnic slurs without being given an opportunity to respond while no male worker had been suspended for using profanity. With respect to the 30-day suspension, plaintiff filed a grievance with her union and an independent arbitrator ruled on July 19, 1994 that Caesars did not have just cause to suspend Costa and must return the 30-day suspended pay to Costa.

Plaintiff also alleged that she was suspended and later terminated after she reported to defendant Hallet that she was assaulted by a male co-worker, defendant Gerber[1], in an elevator. Her termination notice stated she was terminated for "physical/verbal confrontation with [a] co-worker." She alleged that Gerber was sent home on the day of the incident and later suspended for five days. According to plaintiff, prior to this incident and subsequent to this incident, male workers

[1] The parties stipulated to dismiss defendant Gerber prior to trial. See Stipulation and Order for Dismissal of Defendant Herbert Gerber (#58).

who participated in physical and verbal altercations have not been terminated.

On June 10, 1998, plaintiff's action for sex discrimination under Title VII went to trial before a jury.[2] On June 15, 1998, the jury returned a verdict in favor of plaintiff, awarding her $64,377.74 in financial loss damages, $200,000 in emotional distress damages, and $100,000 in punitive damages.

II. Analysis

A. Defendant's Motion for Judgment as a Matter of Law Under Rule 50(b)

Rule 50(a) provides that after a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may grant judgment as a matter of law to the opposing party. Caesars made such a motion at the close of plaintiff's case and again at the close of all evidence but the court did not grant it, and the action was submitted to the jury. In such cases, Rule 50(b) allows renewal of the motion after the return of the verdict. Caesars did so by a written motion (#87).

A judgment as a matter of law is proper when the evidence permits only one reasonable conclusion. *Lawson v. Umatilla County*, 139 F.3d 690, 692 (9th Cir. 1998); *Crowe*

[2] Plaintiff previously voluntarily dismissed some of her claims and the court granted summary judgment (#s 43, 44) on the remainder, except for her sex discrimination claim.

v. Wiltel Communications Sys., 103 F.3d 897, 899 (9th Cir. 1996). The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party. *Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996); *Electro Source, Inc., v. United Parcel Serv., Inc.*, 95 F.3d 837, 838 (9th Cir. 1996). When reasonable minds could differ over the verdict, judgment as a matter of law is inappropriate. See *Venegas v. Wagner*, 831 F.2d 1514, 1517 (9th Cir. 1987).

Caesars argues it is entitled to judgment as a matter of law because the evidence is insufficient to support a verdict in favor of plaintiff on her sex discrimination claim and is insufficient to support an award of punitive damages against Caesars. Caesars claims that "Costa's termination was the only discrete issue in the case and there is no substantial evidence supporting a verdict in favor of Costa on that issue." Motion at 2. As the court recognized in its order on Caesars's summary judgment motion, plaintiff's case involved allegations of discrimination not only in the circumstances of her termination but also in the conditions of her employment. At trial, the evidence showed a pattern of disparate treatment favoring male co-workers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars's conduct towards plaintiff under the mixed motive theory applicable to this case. Although Caesars presented evidence that it believed supported its claim that it would have fired plaintiff regardless of any consideration of her gender (i.e., the "live" suspension on her record), that was not the only reasonable conclusion that could be drawn from all of the evidence. Moreover, Caesars has not pointed to any evidence

demonstrating that it would have treated plaintiff differently with respect to discipline and overtime regardless of any consideration of her gender.

In *Ngo v. Reno-Hilton Resort Corporation,* 140 F.3d 1299, 1304 (9th Cir.), *amended on denial of reh'g by,* 156 F.3d 988 (9th Cir. 1998), cited by Caesars, the Ninth Circuit held that "to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant 'almost certainly knew that what he was doing was wrongful and subject to punishment.'" In *Ngo*, the Ninth Circuit upheld the district court's denial of punitive damages despite an award of compensatory damages because the defendant's discriminatory employment decisions favoring a white female over an Asian-American female were attributable to negligent decision-making and poor communication among managers, not an evil motive. *Id.* at 1304-05. Caesars claims that this standard was not met at trial because plaintiff presented no direct evidence of hostility or animosity based on gender, involvement by higher management in the discriminatory decisions, or a pattern of flouting the law. Yet there was evidence of a pattern of intentional, not merely negligent, discriminatory conduct by plaintiff's supervisor and others in Caesars's management, culminating in plaintiff's termination, which was sufficiently egregious to support an award of punitive damages.

B. Defendant's Motion for a New Trial or Remittitur

"The trial judge in the federal system... has discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.,* 356 U.S. 525,540 (1958). "This discretion

includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 433 (1996). Even substantial evidence supporting the verdict does not deprive the trial judge of discretion to grant a new trial if the verdict is against the clear weight of the evidence. *Landes Constr. Co., Inc. v. Royal Bank of Canada,* 833 F.2d 1365, 1371 (9th Cir. 1987). There is little guidance on the standard to be applied in the exercise of this discretion, however.

The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party. But after weighing the evidence, the trial judge faces a difficult task:

> It may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions [for a new trial on the grounds the verdict is against the clear weight of the evidence]. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand a decent for the collective wisdom of the jury, and for the

> function entrusted to it in our system, certainly suggest that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Id. at 1371-72 (citations omitted).

Caesars contends that the compensatory damages award of $200,000 for emotional harm is excessive and against the manifest weight of the evidence. Caesars argues that Title VII *requires* medical evidence of emotional harm and corroborating testimony from plaintiff's supervisor, family, friends or other others with knowledge of the emotional harm to support an award of emotional harm damages. However, Caesars cites only to a policy guideline of the EEOC pursuant to which *"the Commission* will *typically* require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations" and which also states "there *should* be corroborating testimony" regarding the emotional harm. EEOC Policy Guidance No. 915.002 § II(A)(2) at 10-12 (emphasis added). This falls far short from establishing a evidentiary requirement for recovering emotional harm damages under Title VII. Moreover, in cases involving other civil fights statutes which can offer guidance for Title VII actions, the Ninth Circuit has held that compensatory damages may be awarded for

emotional harm established by the plaintiff's testimony or inferred from the circumstances and that no evidence of economic loss or medical evidence of mental or physical symptoms stemming from the emotional distress need be submitted. *Johnson v. Hale,* 940 F.2d 1192, 1193 (9th Cir. 1991) (section 1983 case); see also *Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1498 (9th Cir. 1995) (in section 1981 case, employee's testimony alone regarding his feelings of frustration, helplessness, and isolation after his six transfer applications had been rejected and racist comments were made was sufficient to support a compensatory damages award).

Here, plaintiff testified that she felt terrible about her treatment at Caesars and could not bear going to work and that she sought treatment for tension headaches from her family doctor. She also testified about the difficult circumstances she endured after she was fired, including that her savings became depleted, that she couldn't make payments on her newly purchased home in which her mother also resided, and that she was contemplating bankruptcy. Although the court finds that the jury's award of compensatory, damages is not against the manifest weight of the evidence because neither medical nor corroborating testimony is required to prove emotional harm, the amount of the award does appear excessive. Plaintiff's testimony and medical records indicate that the emotional harm suffered by plaintiff was neither severe nor enduring,[3] though plaintiff undoubtably suffered during the time she was subjected to

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[3] Plaintiff testified that she did not have headaches after she ceased working for Caesars and that she is currently able to work.

discriminatory treatment in her daily job at Caesars and for a period of time after her termination. Accordingly, Caesars's motion for a new trial will be denied on the condition that plaintiff accept a reduction in compensatory damages from $200,000 to $100,000 within 30 days of the service of this order. If plaintiff does not, Caesars's motion for a new trial will be granted on the issue of the amount of compensatory damages only.

C. Plaintiff's Motion for Attorney's Fees and Costs

Caesars does not dispute that plaintiff is entitled to attorney's fees and costs as a prevailing party under Title VII but seeks a reduction in the amount of such fees and costs sought by plaintiff.

1. Setting the Fee

The procedure for setting a reasonable attorney's fee is outlined in *Morales v. City of San Rafael,* 96 F.3d 359, 363-65 & nn. 8-12 (9th Cir. 1996), *amended on denial of reh'g by,* 108 F.3d 981 (9th Cir. 1997): (1) determine the number of hours the prevailing party reasonably expended on the litigation; (2) determine the reasonably hourly rate; (3) multiply the number of hours by the hourly rate to determine the "lodestar"; and (4) if necessary to the setting of a reasonable fee, adjust the lodestar in light of the LR 54-16 factors[4] not already taken into account. The adjustment in the fourth step is known as a "multiplier." *Guam Soc'y of*

[4] In essence. LR 54-16 is a codification of the 12 *Kerr* factors. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

Obstetricians & Gynecologists v. Ada, 100 F.3d 691,697 (9th Cir. 1996). There is a strong presumption that the lodestar is the one reasonable fee, some LR 54-16 factors are already subsumed in the lodestar, and the fee applicant must show that an adjustment to the lodestar is "necessary" – in other words, a prevailing plaintiff must make a strong showing to warrant the application of a multiplier. *Morales,* 96 F.3d at 363-64 & nn. 8-9. On the other hand, where a plaintiff' s success was "limited" the attorney's fees "must be reduced to reflect the limited degree of [] success," and although "[t]here is no precise formula for determining the extent to which a party has prevailed," the difference between what is sought and what is recovered is not the only consideration. *LeMaire v. Maass,* 12 F.3d 1444, 1461 (9th Cir, 1993); *see Morales,* 96 F.3d at 364.

2. Calculation of the Lodestar

a. Reasonable Hours

Plaintiff seeks compensation for a total of 287.4 billed hours from the time of the initial meeting between plaintiff and her counsel through trial. Plaintiff supports her claimed hours with an affidavit of her counsel, Robert N. Peccole, and a twelve-page billing statement detailing the number of hours spent on each task and providing a short description of the task. See Motion (#82) & Exh. 1.

Caesars makes several challenges to specific items billed. First, Caesars challenges the time allegedly spent on clerical matters, including time claimed for organizing documents and preparing a list of documents, bate stamping documents, and delivering documents. However, plaintiff

clarified in her reply that no time was actually billed for bate stamping documents or delivering documents but that time was billed for reviewing and indexing bate stamped documents received from Caesars and revising a joint discovery report. A review of the billing statement confirms plaintiff's explanation. Further, this court finds that time spent organizing documents and preparing a list of documents for disclosure in compliance with LR 16-1 is compensable attorney time, especially in light of the few hours involved.

Second, Caesars objects to amount of time claimed for preparing the complaint and opposing summary judgment. Caesars argues that 14.8 hours spent preparing the complaint is excessive. However, this time included performing legal research, two meetings between plaintiff and her counsel, and drafting the complaint. In this context, 14.8 hours to prepare a complaint does not appear excessive on its face and Caesars offers no other reasons why it should be considered excessive. Caesars also contends that spending 39.10 hours to oppose a summary judgment motion is excessive. Yet Caesars does not indicate how much time was spent preparing its summary judgment motion and supporting exhibits. Caesars's motion for summary, judgment was detailed, addressing each of plaintiff's six claims remaining at that time and containing many exhibits. Summary judgment is a crucial stage for any lawsuit and it was not unreasonable for plaintiff's counsel to spend 39.10 hours in this case to oppose Caesars's summary judgment motion.

Third, Caesars argues that none of the 18 hours claimed for co-counsel's time at trial should be compensated. Caesars directs the court's attention to the fact that the co-counsel was not involved in any pretrial-work on the case as

shown by the billing statement and that Caesars was represented by only one attorney at trial. In her reply, plaintiff argues that co-counsel's presence was necessary at trial to monitor plaintiff's numerous exhibits, to coordinate witnesses, to consult on issues and to monitor time usage since each party was allocated only ten hours for the trial. Plaintiff also points out that Caesar's counsel was joined in the courtroom during trial by a legal assistant and a representative of Caesars. Because co-counsel performed tasks which could have been performed by a legal assistant and did not take an active role in the case prior to trial, the court will allow his time to be claimed only a rate of $80 per hour.

b. Reasonable Hourly Rate

Defendants do not object to the reasonableness of plaintiff's counsel's $180 pre-trial hourly rate and $250 hourly rate for trial. As stated above, time billed by co-counsel during trial will be compensated at a hourly rate of $80. Thus, the lodestar amount can be calculated as follows: 251.4 hours multiplied by $180 (or $45,252) plus 18 hours multiplied by $250 (or $4500) plus 18 hours multiplied by $80 (or $1440) for a total of $51,192.

c. Adjusting the Lodestar

The lodestar amount should be considered in light of the LR 54-16 factors. Some factors are inapplicable (for example, (J) time limitations imposed by the client or the circumstances), or subsumed in the lodestar (for example, the customary fee, the novelty and complexity of the issues, the special skill, experience, and reputation of counsel, and the

quality of representation). See *Snell v. Reno Hilton Resort,* 930 F.Supp. 1428, 1432-33 (D.Nev. 1996) (listing factors subsumed in the lodestar figure). In this case, defendants seek a reduction of the lodestar to take into account plaintiff' s lack of success on her other eight claims which were eliminated at summary judgment or voluntarily dismissed. See LR 54-16(b)(3)(C). When a plaintiff wins on some claims and loses on others, the plaintiff may recover on the unsuccessful claims only if they are legally or factually related to the prevailing claim. In that case, however, the court must consider the overall success of the lawsuit. *Hensley,* 461 U.S. at 434-35.

On the issue of "relatedness" of successful and unsuccessful claims, the Ninth Circuit has held:

> The test for relatedness of claims is not precise. However, related claims will involve "a common core of facts" or will be based on related legal theories, while unrelated claims will be "distinctly different," and based on different facts and legal theories .... Thus, the test is whether relief sought on the unsuccessful claim "is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the injury upon which the relief is granted is premised."

Thorne v. City of El Segundo, 802 F.2d 1131, 1141 (9th Cir. 1986) (citations omitted). In *Odima v. Westin Tucson Hotel,* 53 F.3d 1484 (9th Cir. 1995), the Ninth Circuit considered whether a plaintiff's unsuccessful state tort claims for

retaliation, constructive discharge, and wrongful termination were "related to" his successful Title VII and section 1981 claims for purposes of an attorney fee award. Because all of the plaintiff's claims arose from a common core of facts involving his employment relationship with the defendant and thus virtually the same evidence supported both the successful and unsuccessful claims, the court found that the claims were related. *Id.* at 1499.

As in *Odima,* plaintiff's unsuccessful claims for sexual harassment, tortious discharge, intentional infliction of emotional distress, battery, relief under respondeat superior, negligent hiring, retention and/or supervision, retaliation and breach of contract and her successful sex discrimination claim arose from the same common core of facts concerning her employment relationship with Caesars. Although the battery claim was brought only against defendant Gerber, the incident involving the alleged battery was Caesars's reason for terminating plaintiff. One of the allegations supporting plaintiff's sex discrimination claim was that defendant Gerber was treated more favorably than plaintiff by Caesars as a result of the incident involving the alleged battery. Thus, the facts of plaintiff's voluntarily dismissed battery claim were intertwined with plaintiff's other causes of action, including her successful sex discrimination claim. Cf. *Reed v. A.W. Lawrence & Co., Inc.,* 95 F.3d 1170, 1183 (2nd Cir. 1996) (upholding district court's finding that successful retaliation claim was related to voluntarily dismissed sex discrimination claims for purposes of fee award).

Although plaintiff's successful and unsuccessful claims are related, the court must still consider the overall success of plaintiff's lawsuit to determine if a full award of the requested

fees is warranted. *Hensley,* 461 U.S. at 435. Caesars argues that plaintiff achieved only partial or limited success because eight out of plaintiff's nine claims were eliminated or dismissed before trial. Although the number of claims eliminated or dismissed before trial suggest that the overall success of plaintiff's suit was limited, the types of damages available for plaintiff' s unsuccessful claims largely overlap with the damages actually awarded to plaintiff for her successful Title VII sex discrimination claim. Moreover, the amount of back pay, compensatory and punitive damages awarded by the jury, even after the court's reduction of compensatory damages, is significant. Thus, a reduction of the lodestar is not warranted in light of plaintiff s overall success.

3. Nontaxable Costs

Because Caesars does not oppose plaintiffs request for $780.38 in non-taxable copying costs, see Plaintiff's Motion (#82), Exh. 2, this amount will be added to the lodestar for reasonable fees.

Therefore, plaintiffs motion for attorney's fees and costs will be granted for the total amount of $51,972.38.

D. Plaintiff's Motion for Review of Clerk's Taxation of Costs

On June 24, 1998, plaintiff submitted a bill of costs claiming a total of $4,537.35 in taxable costs. Upon objection by Caesars (#84) to certain items claimed in the bill of costs, the clerk of the court taxed costs in the amount of $464 because plaintiff s counsel had failed to provide the proper

documentation for fees for the service of summons and subpoena, for copies, for photographs, for depositions, and for service of subpoena on Dr. Hoffman. See Clerk's Memorandum Regarding Taxation of Costs (#86). The clerk also denied certain fees for witnesses because those witnesses were not used at trial. *Id.* On July 2, 1998, plaintiff filed a motion for review of the clerk's taxation of costs under LR 54-14 and Fed.R.Civ.P. 54(d). No opposition has been filed.

Plaintiff concedes that she inadvertently failed to attach the proper documentation supporting her bill of costs but was unable to respond to Caesars's objection and provide the proper documentation before the clerk taxed costs in the amount of $464. Plaintiff attaches to her motion invoices for depositions costs claimed (totaling $3660.50), a receipt for photographs used at trial ($20.70), and an invoice for the service of a subpoena on Dr. Hoffman ($55). Plaintiff does not include any documentation of fees for the service of summons and subpoena or for copies (which were itemized in the original application). Nor does plaintiff contest the denial of witness fees for witnesses not used at trial.

> LR 54-1 (b) provides in part (with emphasis added):
>
> Every bill of costs and disbursements shall be verified and distinctly set forth each item so that its nature can be readily understood. The bill of costs shall state that items are correct and that the services and disbursements have been actually and necessarily provided and made. An itemization and, *where available,*

documentation of requested costs in all categories must be attached to the bill of costs.

Because the plaintiff has now provided the court will proper documentation of deposition costs and fees for photographs used at trial, those amounts (totaling $3681.20) will be taxed. In addition, although plaintiff did not provide documentation of the fees for copies, documentation is only required under LR 54-1 (b) "where available" and plaintiff did provide itemization of the copying costs. Accordingly, the court finds that documentation for such incidental costs as copying costs is not always necessary and will order that an additional amount of $181.40 be taxed for such costs. Plaintiff concedes that she is not entitled to witness fees for Dr. Hoffman because she fails to rebut the presumption that Dr. Hoffman's attendance at trial was unnecessary. Although not addressed by the Local Rules, the court finds that the cost of service of a subpoena on an unnecessary witness should not be allowed.

Thus, the court will grant plaintiff's motion for review of the clerk's taxation of costs and will require the clerk to tax additional costs in the amount of $3862.60.

III. Conclusion

Accordingly, **IT IS ORDERED** that defendant's motion (#87) for judgment as a matter of law is DENIED; defendant's motion (#87) for a new trial is DENIED on the condition plaintiff accept a reduction of compensatory damages to $100,000 within 30 days of the service of this order. If plaintiff does not accept this reduction, Caesars' s

motion (#87) for new trial will be granted on the issue of the amount of compensatory damages only.

IT IS FURTHER ORDERED that plaintiff's motion for attorney's fees and costs (#82) is GRANTED in the amount of $51,972.38.

IT IS FURTHER ORDERED that plaintiff's motion (#90)for review of the clerk's taxation of costs is GRANTED and the clerk is instructed to tax additional costs in the amount of $3862.60

DATED: This 25th day of January, 1999.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-96-009-DWH(RJJ)

[Filed June 15, 1998]

CATHARINA F. COSTA,
Plaintiff,

vs.

DESERT PALACE, INC., dba CAESARS PALACE HOTEL & CASINO; HERBERT GERBER; RICHARD J. STEWART; and KAREN HALLET,
Defendants.

VERDICT FORM

We the jury, duly impaneled and sworn upon our oaths, submit the following verdict:

1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff' s gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?
Yes _X_ No ___

NOTE: If you answered No to Question 1, your deliberations are complete and you need not answer any further questions. If you answered yes, please answer the following special interrogatory:

2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?
Yes _X_ No ___

If your answer was "Yes", answer the next question. If your answer was "No", proceed to question No. 4.

3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?
YES ___ NO _X_

If you answered "Yes", stop and sign and date this form. If you answered "No", please continue.

4. What amount of financial loss do you find should be awarded to Plaintiff?
$64377.74.

5. What amount of damages do you find should be awarded to Plaintiff for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life?
$200,000.00

6. Was Defendant's violation willful and egregious or committed with reckless disregard to plaintiff s rights?
Yes _X_ No ____.

NOTE: If you answered No to Question 6, your deliberations are complete and you need not answer any further questions.

7. If you answered Yes to Question 6, what amount of damages do you find should be awarded to Plaintiff for punitive damages? $ 100,000.00

/s/ _____
JURY FOREPERSON

6/15/98
Date

Supreme Court, U.S.
FILED
NOV 21 2002
OFFICE OF THE CLERK

No. 02-0679

In The

Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are Desert Palace, Inc., d.b.a. Caesars Palace Hotel & Casino, Petitioner, and Catharina Costa, Respondent. Caesars Palace, in its corporate disclosure (p.ii) of the Petition disclosed Park Place Entertainment, Inc. as owner of Desert Palace, Inc.

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I.

REASONS FOR DENYING THE WRIT

A. The Ninth Circuit Court's Decision Does Not Conflict With The Court's *Price Waterhouse* Decision Or The 1991 Amendment To Title VII

This court, in the *Price Waterhouse v. Hopkins* case, 490 U.S. 228, 109 S. Ct. 1775 (1989), adopted the "mixed motive" method of proving disparate treatment. Basically, the mixed motive theory arises when an improper motive, such as gender discrimination, is present along with a legitimate motive for the specific action taken against an employee by the employer. In such an instance, this court allowed an employee to establish a prima facie case by proving that an improper motive came into play and the burden shifted to the employer to prove that the action taken against the employee would have occurred even if the improper motive had not existed.

The concurring opinion of Justice O'Connor in *Price Waterhouse* gave birth to the direct evidence language that has found its way into the mixed motive cases. The "direct evidence" language used by Justice O'Connor created the problem of what was meant by that language. Was it meant to restrict the type of evidence that could be used or was it intended to heighten the burden of the plaintiff? Circuit courts have, admittedly, used different approaches not knowing what was intended as the proper approach.

The plurality in the *Price Waterhouse* decision refused to establish an evidentiary criterion and certainly did not establish a heightened burden for the plaintiff. The plurality stated:

"By focusing on Hopkins specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and *we refrain from deciding here which specific facts standing above, would or would not establish a Plaintiff's case, since such a decision is unnecessary in this case.* But see post, at 277 (O'Connor, J., concurring in judgment)." Id. at pp. 251 & 252 (Emphasis added).

The plurality also stated:

"We think these principles require that, once a plaintiff in a Title VII case shows that gender played a *motivating part* in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights." Id. at pp. 244 & 245 (Emphasis added).

Subsequent to the *Price Waterhouse* decision, Congress, in 1991, amended Title VII adopting the language of the plurality:

> "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m).

Congress did not apply a heightened burden of proof upon the plaintiff nor did Congress go beyond the "motivating factor" standard established by the plurality. In

plain language, Congress stated that a plaintiff need merely "demonstrate" that gender was a motivating factor.

Justice O'Connor's direct evidence language did not survive the pluralities' view, which was ultimately adopted by Congress with respect to burden of proof and the evidence necessary.

Clearly, the Ninth Circuit was well within the parameters established by the plurality in *Price Waterhouse* and the Ninth Circuit decision does not conflict with either *Price Waterhouse* or the 1991 Amendment to Title VII.

The Ninth Circuit has ruled that all the evidence presented by the plaintiff, whether circumstantial or direct, is admissible to make the determination as to whether a mixed motive case has been established, and they have elected not to create a burden of proof upon the plaintiff that wouldn't apply in any other civil case. The court said, "Here too, we believe that we are well advised to follow the statute instead of engaging in judicial invention." (Petitioner's App. 19a).

B. The "Direct Evidence" Conundrum

All through Petitioner's Petition for Writ of Certiorari, Petitioner refers to Justice O'Connor's direct evidence language but makes no attempt to define whether it means direct evidence as opposed to circumstantial, or whether it means a heightened burden of proof required of the plaintiff. Petitioner cites a number of cases for the proposition that the Ninth Circuit decision is in conflict with other circuits, however, a reading of the cases will indicate that some define direct evidence as allowing all evidence presented by the plaintiff, which does not conflict

with the Ninth Circuit decision, and the others deal with a heightened burden which the Ninth Circuit did not agree with.

The Ninth Circuit chose not to be drawn into the direct evidence conundrum and instead, chose to look to the 1991 Amendments as a resolution.

C. The Direct Evidence Language Established By Justice O'Connor Is Not Binding

Justice O'Connor was only one Justice writing a concurring opinion in a majority opinion. The plurality consisted of four Justices who joined in the opinion written by Justice Brennan.

As stated before, the plurality did not impose a direct evidence rule but did establish the language adopted in the 1991 Amendments. In this light, a Circuit Court would not have to feel bound by language in a single Justice's concurring opinion.

D. Abuse of Discretion

The Ninth Circuit, as did the *Price Waterhouse* decision, recognized that the District Court trial judge, after all the evidence, would make the determination of whether a mixed motive instruction should be given. See: *Price Waterhouse* p. 247, fn. 12.

The Ninth Circuit applied the abuse of discretion standard of review to the giving of the mixed motive instruction by the trial judge (Petitioner's App. 32a) and

concluded that the "district court did not abuse its discretion in giving a mixed motive instruction." (Petitioner's App. 35a).

E. Denial of Motion for Judgment as a Matter of Law

The Ninth Circuit applied the standard applicable to granting of a motion for judgment as a matter of law which is the vehicle used by Caesars to appeal to the Ninth Circuit and to present its Petition for Writ of Certiorari to this court.

The Ninth Circuit applied the very strict standards that are required by law and which favor the plaintiff's position. After a thorough analysis, the court concluded that a motion for judgment as a matter of law was not appropriate. (Petitioner's App. 35a-43a).

II.

MISSTATEMENT OF FACT AND LAW

Petitioner at pages 4 and 5 of its petition makes reference to the "mixed motive" instruction given to the jury. Petitioner claims the instruction was given "over the objection of counsel for Caesars."

This statement is incorrect. Caesars' counsel requested the single motive (*McDonnell Douglas*) instruction, and when asked by the District Court Judge about instruction 10 (mixed motive), Caesars counsel replied, "And I'll agree with the Court, that it is a reasonable statement of the 'mixed-motive' instruction so . . . ." The instruction was in fact a Ninth Circuit model instruction previously adopted by the Ninth Circuit.

The Ninth Circuit, in its opinion discussing the mixed motive instruction and its wording, ruled, "Caesars, however, waived any objection to the form of the instruction by conceding at trial that it was 'a reasonable statement of the mixed motive instruction'." (Petitioner's App. 34a).

CONCLUSION

The Ninth Circuit's decision is not in conflict with *Price Waterhouse* or the 1991 Amendments to Title VII.

The giving of "mixed motive" instructions to the jury, in the discretion of the trial judge, was not an abuse of discretion, as ruled by the Ninth Circuit. Applying the standards of review, applicable to a motion for judgment as a matter of law, gave rise to a proper decision by the Ninth Circuit that Caesars was not entitled to a judgment as a matter of law.

The Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
FEB 27 2003
OFFICE OF THE CLERK

No. 02-679

In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI GRANTED JANUARY 10, 2003

62 pp

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The following opinions, decisions, judgments and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for Writ of Certiorari:

United States District Court -- Order, filed January 28, 1999 . . . . . Pet. App. 70a

Court of Appeals -- Original Opinion, filed October 2, 2001 . . . . . Pet. App. 54a

Court of Appeals -- En Banc Opinion, filed August 22, 2002 . . . . . Pet. App. 1a

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[1] The original jury instructions were misplaced by the District Court. The parties agreed by stipulation to supplement the record with another copy of the jury instructions. J.A. 2

RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: CV-S-96-00009-DWH (RJJ)

1	1/4/96	COMPLAINT W/ JURY DEMAND. fj
69	6/3/98	SEPARATE JURY INSTRUCTIONS (with citations). fj cpy to DWH
71	6/8/98	OBJECTIONS to Ds proposed jury instructions obo P. (p) (AT) fj
80	6/17/98	JUDGMENT IN A CIVIL CASE (DWH) ORD in favor of p and against d. Cps dis (AT) fj
87	6/29/98	MOTION for judgment as matter of law; MOTION FOR NEW TRIAL OR REMITTITUR OBO D. (m) (AT) fj
93	1/27/99	ORDER (DWH) Ds. mtn (#87) for judgment as a matter of law is DENIED: Ds mtn (#87) for new trial DENIED on condition P accepted a reduction of compensatory damages to $100,000 within 30 days of service of this order. If p does not accept this reduction, Caesar's mtn (#87) for new trial will be granted on the issue of the amt of compensatory damages only. FUR ORD ps mtn for attnys fees/costs (#82) is GRANTED in amt of $51,972.38. FUR ORD mtn (#90) for review of clk's taxation of costs

		GRANTED and clk instructed to tax additional costs in amt of $3862.60. Cps dist. (At) fj EOD 1-28-99
97	2/17/99	JUDGMENT IN CIVIL CASE (DWH) ORD JUDGMENT IN FAVOR O P & against D. CPs dist. (AT) fj EOD 2-17-99
98	3/2/99	NOTICE of appeal obo D Desert Palace re #97. Appeal filing fees pd #30237. (m) (AT) fj
113	9/14/99	STIPULATION/ORDER (DWH) RE JURY INSTRUCTIONS FOR RECORD ON APPEAL. fj

USCA Docket Sheet for 99-15645

4/7/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : yes. setting schedule as follows: CADS is past due; CADS must be filed no later than 4/14/99; appellant's designation of RT is due 3/12/99; appellee's designation of RT is due 3/22/99; appellant shall order transcript by 4/1/99; court reporter shall file transcript in DC by 5/3/99,; certificate of record shall be filed by 5/10/99; [99-15645] (dg) [99-15645]

9/13/00	ARGUED AND SUBMITTED TO Alex KOZINSKI, Andrew J. KLEINFELD, William W. Schwarzer [99-15645] (ms) [99-15634]
9/27/00	FILED CERTIFIED RECORD ON APPEAL: 5 CLERK'S RECORDS, 5 REPORTER'S TRANSCRIPTS, AND 2 FOLDERS OF BULKY DOCUMENTS. (ORIGINAL) [99-15645] (sd) [99-15645]
12/29/00	FILED OPINION: VACATED in part; REVERSED in part; and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alex KOZINSKI; Andrew J. KLEINFELD; William W. Schwarzer, author.) FILED AND ENTERED JUDGMENT. [99-15645] (dg) [99-15645]
1/11/01	[4072052] Filed original and 50 copies Appellee Catharina F. Costa's petition for rehearing with suggestion for rehearing en banc 11 p.pages, served on 1/9/01 (PANEL AND ALL ACTIVE JUDGES) (sm) [99-15645]
10/2/01	OPINION FILED (Alex KOZINSKI; Andrew J. Kleinfeld; William W. Schwarzer,): denying petition for

	rehearing [4072052-1] VACATED in part; REVERSED in part; and REMANDED. [99-15645] (gar) [99-15645]
10/4/01	Filed Catharina F. Costa's motion to stay the mandate pending pet for writ of cert to Supreme Ct. [99-15645] served on 10/3/01 FEDEXED TO JUDGE KOZINSKI (presiding judge [4268786] (gar) [99-15645]
12/19/01	Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of nonrecused regular active judges of this ct, it is ordered that this case be reheard by the en banc court pursuant to CR 35-3. The 3-judge panel opinion shall not be cited as precident by or to this ct or any dc of the 9th Cir, except to the extent adopted by the en banc ct. [4072052-1] [99-15645] (gar) [99-15645]
3/21/02	ARGUED AND SUBMITTED EN BANC TO: Mary M. SCHROEDER, Stephen R. REINHARDT, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Barry G. SILVERMAN, Susan P. GRABER, M.M. McKEOWN, Raymond C.

	FISHER, Ronald M. GOULD, Richard A. PAEZ [99-15645] (dl) [99-15645]
8/2/02	OPINION FILED (Mary M. SCHROEDER, Stephen R. REINHARDT, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Barry G. SILVERMAN, Susan P. GRABER, M. M. McKEOWN, Raymond C. FISHER, Ronald M. GOULD, Richard A. PAEZ,) : AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. M. M. McKEOWN is author dissent by Ronald M. GOULD, Alex KOZINSKI, Ferdinand F. FERNANDEZ and Andrew J. KLEINFELD. Each party to bear its own costs on appeal. [99-15645] (gar) [99-15645]
8/27/02	MANDATE ISSUED [99-15645] (hh) [99-15645]

Cross-Examination of Catherina F. Costa by Mr. Mark M. Ricciardi: [p. 233]...BY MR. RICCIARDI:

Q Now, you say Mr. Gerber physically attacked you, correct?

A I was attacked in the elevator and it was not mutual.

Q And you claim he started it?

A He came in after me. I was in the process of doing my job. He was supposed to be at lunch. He shouldn't have even been there interfering with my job.

Q So it's your testimony, then, that this was not a verbal altercation in the elevator?...

THE WITNESS: I was assaulted in the elevator.

What transpired after I was assaulted, you might call that a verbal altercation. I don't know what you – what you're meaning by this.

BY MR. RICCIARDI:

Q Now, Mr. Gerber claimed that you physically attacked him, didn't he?

[p. 234] A Yes, he did.

Q And he claimed that you started it.

A Then why did he come after me in the elevator?

I did not start it. He came after me. I was minding my own business. I had no idea what he was talking about.

Q But you claim he started it, he claimed you started it, there was -- there's no witnesses to this, this was in an elevator, correct?

A There was no witnesses in the elevator, no....

[p. 237]...Q And you thought you were treated more harshly in this elevator incident than Mr. Gerber because you were female?

A I knew I was treated more harshly because I was assaulted. I'm the one that had the bruise.

He came after me, I did not go after him. He came after me a second time upstairs after Karen said she would take care of him.

And the men, they fight and get their slap on the wrist. There are instances in the warehouse where the men have fought and there was no discipline, it was never put in their file.

Q So in this incident, it's you and Mr. Gerber, right?

A Yes.

Q In the elevator, and you and Mr. Gerber got a five-day suspension and you got a termination, correct?

A Yes.

Q And you thought that was unfair. You thought you were treated more harshly than Mr. Gerber because you're a woman.

That's the basis of your sex discrimination claim, isn't it?

A Not only am I a woman, but I was the one that was assaulted, and I doubt if I were one of the men he would have done that to me...

[p. 248]...BY MR. RICCIARDI:

Q Now, you said at one point Mr. Dudenake got some overtime, and you felt it was unfair for him to get it instead of you?

A I didn't exactly put it that way. I thought the whole situation was unfair.

Q Now, you said something about being told why he got the [p. 249] overtime. Were you quoting Mr. Bach or Mrs. Hallett on that?

A That was a question that was asked of Mr. Bach, and I think Karen originally made that, and she was -- the office is connected, and I think she was in his office when he answered us when that question was asked.

Q So this is Mr. Bach you're quoting when you're saying -

A He's the one that -- he's the one that verified the statement, yes.

Q And he said that Dudenake was getting the overtime because he had a family to support?

A That's what was said at the time.

Q He didn't say anything about Mr. Dudenake being a man in that conversation?

A I took it as such.

Q But he didn't say that?

A A man that has a family to support.

Q You took it that way, but he didn't say the word "man," did he?

A He didn't have to say the word "man" because people can say a lot of things. The inference was there...

[p. 260]...Q Now, at Caesar's there was never any joking around about the fact that you're a woman and all the rest of the Teamsters were men, was there?

A I had guys make reference and say things to me like, "You got more balls than the guys."

I was called a bitch, things like that. I don't know if that would be considered --

Q Well, there was never any joking around about the fact that you're a woman and they were all men?

A I think saying -- making a statement like I've got more [p. 261] balls than the guys is -- speaks for itself....

BY MR. RICCIARDI :

Q Go down to line thirteen. Did you find line thirteen? Have you found line thirteen yet, ma'am?

A Yes.

Q See the question where I asked you,

"QUESTION: No joking around, like, just the fact that you're a woman and they're all men?"

And your answer was, "To my face, no."

Do you see that? Did I read that correctly?

Did I read those words correctly?

A This is out of context because, in the paragraph before, you're talking about NBC and California and --

Q But this line of questions was every job you've had through Caesar's, wasn't it?

A I don't -- I don't know if it was. It's taken out of context. I --

Q Well, then, let me ask you a different question.

During the time you were at Caesar's, no manager or supervisor ever made a remark to you that included specific reference to you being a woman or a girl or female, isn't [p. 262] that correct?

A You don't necessarily have to make a remark to a person when the inference is there and the actions are there, and the actions were noticeable, that I felt -- I felt uncomfortable.

It made my life miserable. I was upset. I got headaches. The inference was there. I knew I was being treated differently because I was a woman.

Q Is that a long way of saying no, no one ever made such remarks to you, ma'am?

A I don't remember if they did....

Redirect of Jeffrey Graham by Mr. Robert N. Peccole: [p. 298]...Q And did you ever hear Karen Hallett make any remarks about Catharina Costa?

A Yes, sir.

Q And what were those remarks?

A On more than one occasion, she -- Karen had called me into [p. 299] her office and told me that she wanted to get rid of that bitch.

Q And did she give you any reason why?

A No, it was basically she did not like the way that Catharina did her job....

[p. 307]...Q And did she ever refer to Catharina Costa as not being a team player?

A That's what I just said, she consistently --

Q I'm sorry. I'm having a hard time --

A She consistently kept -- let me start over.

Karen Hallett constantly made the statement to me that Catharina Costa was not a team player....

Cross Examination of Donald Thomas by Mr. Mark J. Ricciardi: [p. 323]...Q Now, Ms. Costa and Ms. Hallett, they didn't like each other, did they?

A I would say no.

Q As far as you know, it was a personality conflict?

A I -- I don't know what -- I don't know what you would call it.

Q Well, Ms. Costa never said anything about not liking Ms. -- excuse me, Ms. Hallett never said anything in your presence about not liking Ms. Costa just because she was a [p. 324] woman, did she?

A No.

Q In fact, Ms. Hallett had other Teamsters that she either favored or didn't favor, right?

A Yeah.

Q You didn't see it was any basis -- that it was based on sex or someone being a female versus a male?

A No.

Q And when Mr. Peccole was asking you questions about was she treating Ms. Costa differently than the men, all of the other Teamsters were men, isn't that true?

A Right....

Direct Examination of Mark Dudenake by Mr. Robert N. Peccole: [p. 328]...Q Did you have some complaints about the way Ms. Hallett was assigning overtime?

A I had some complaints about overtime, yes. I don't know [p. 329] who was in charge of it.

Q Did you file grievances over that?

A Yes.

Q This was during the time you were working under Ms. Hallett, though?

A Correct....

Cross-Examination of Mark Dudenake by Mr. Mark J. Ricciardi: [p. 335]...Q At the time that you had made grievances concerning overtime, was there a procedure that was to be used with regard to who got what overtime?

A Yes, there was a schedule.

Q And she was not following that procedure?

A No.

Q And is that why you were grieving?

A Correct....

Cross-Examination of Ray Bell by Mr. Mark J. Ricciardi: [p. 340]...Q Now, you never observed Karen Hallett picking on Ms. Costa, did you?

A No.

Q And you never observed Ms. Hallett stalking Ms. Costa?

A No, I just heard about those incidences.

Q And Ms. Costa was very vocal about union contract issues with Ms. Hallett, wasn't she?

A Yes, she was the steward at the time....

Cross-Examination of Bobby Whitaker by Mr. Mark J. Ricciardi: [p. 348]...Q You didn't think overtime was being given out fairly by Ms. Hallett, did you?

A No, I did not.

Q That was because you, yourself, were also losing overtime; is that right?

A Yes, sir.

Q And in terms of contract issues that came up, Ms. Costa was a very vocal steward, wasn't she, in confronting management?

A Well, confronting management, she was very vocal about enforcing the contract....

Cross-Examination of Donald Cornaggia by Mr. Mark J. Ricciardi: [p. 357]...Q You had a problem with the way overtime was distributed at one point by Ms. Hallett, didn't you?

A Yes.

Q You felt it wasn't fair the way it was being done?

A That's correct....

Defendant's Motion for Judgment as a Matter of Law and Objection to Jury Instructions: [p. 458]...MR. RICCIARDI: Your Honor, I would like to [p. 459] make a motion for

judgment as a matter of law on all issues currently before the Court.

In particular, I don't think that there's been sufficient evidence raised to show a prima facie case of discrimination.

There have not been incidents of similarly-situated individuals treated differently. Furthermore, the hotel has come forward with legitimate nondiscriminatory reasons for the actions that were taken, and there's been no evidence sufficient to withstand this motion raised to create a jury issue of pretext.

THE COURT: All right. We're dealing now with mixed motive, we're not dealing with single motive, first of all.

And in the context of a mixed motive case, one looks at discrimination based on sex in the areas of compensation, terms, conditions, privileges, either by disparate treatment or by causing a disparate result or by hostile work environment.

This is apparently a disparate treatment case having to do with those matters about which the plaintiff has complained, the overtime request, the discipline, the conditions of her employment.

The elements of this mixed motive case are set forth in Price-Waterhouse. Plaintiff's burden is to show that sex [p. 460] played a motivating part in the decision.

I think she's produced evidence to satisfy her burden with respect to that.

Defendant's burden is that the decision would have been the same even if sex had played no role, and I think both sides have even thus far, if everybody stopped right now, proved a case for the jury.

So the motion is denied.

Now, let's go into jury instructions.

MR. PECCOLE: Your Honor, plaintiff has no objections to the instructions or the verdict form.

THE COURT: All right. May I hear from the defense?

MR. RICCIARDI: Yes, your Honor.

We have no objections to the Court's instructions 1 through 9. I believe this is not a mixed motive case, and under Price-Waterhouse, direct evidence of discrimination is required.

So I believe that the burden that has been placed on the defendant --

THE COURT: You mean direct as opposed to circumstantial?

MR. RICCIARDI: Yes, your Honor.

THE COURT: You can't infer discrimination from the conduct of the employers?

[p. 461] MR. RICCIARDI: You can infer discrimination, but that's the set up for a prima facie case. The cases that give the mixed motive --

THE COURT: All right. Okay. Go on. I just wanted to make sure I heard you correctly.

Now, you're objecting to --

MR. RICCIARDI: Number ten.

THE COURT: Oh, ten, sorry, okay.

MR. RICCIARDI: And I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction so --

THE COURT: All right, good. And so what you would want, for example, would be to show the unlawful discrimination and then have the defendant show the legitimate nondiscriminatory reason and then have the plaintiff be required to show pretext.

MR. RICCIARDI: Yes, your Honor.

THE COURT: And that's the basis of your objection?

MR. RICCIARDI: Yes, your Honor.

THE COURT: All right. Please go on to your next objection.

MR. RICCIARDI: Number thirteen is the punitive damage instruction.

And I know this is discretionary with the Court [p. 462] because it's not a substantive issue, but it's a wording issue on line six.

I think the concept here that the Court is trying to convey is that to award punitive damages, you have to have a showing of intent higher than the level necessary to get compensatory damages, and I just think the word threshold is not a word that's in every day use with most jurors, and I don't think the word is necessary there.

I know it's minor, your Honor, but --

THE COURT: Do you have any thoughts on that, Mr. Peccole, one way or the other?

MR. PECCOLE: Your Honor, I'll abide by whatever the Court wants to do on that instruction. It meets my approval on this, I don't have any problem with any of that language.

THE COURT: I haven't any problem taking threshold out.

Well, we'll take that under advisement overnight. Let me just make a note of it and let you know in the morning whether I have so you'll know what you'll be getting.

Please go on.

MR. RICCIARDI: Number fourteen is a correct statement of the law, however, I think it's unnecessary and potentially confusing and could be misunderstood in this case.

[p. 463] There's going to be lots of evidence of supervisors or there has been lots of evidence of supervisors doing different things for different reasons, and to highlight this could send the message to the jury that if a supervisor makes either an unwise business decision or a mistake, even if it's not sexual discrimination, it could lead the jury to think that Caesar's would still be responsible to pay damages for that.

That's why I think this is unnecessary in this case and could be misunderstood and misleading to the jury.

THE COURT: Well, if that's the case, would you be satisfied if after "personnel" there were added "in matters like this," "in matters of this kind," in order to focus the statement upon the case at hand.

MR. RICCIARDI: That would be somewhat better, your Honor.

THE COURT: All right. Next please.

That's it, I guess.

MR. RICCIARDI: Well, I, just for the record, will make a -- I don't know, the verdict form itself, of course, that's based on the mixed motive instruction so my objection –

THE COURT: And your objection carries on through to the verdict form, of course.

MR. RICCIARDI: And then if I may just put on [p. 464] the record what I've proffered that you're not giving, is it sufficient that I've filed with the Court –

THE COURT: It's sufficient that you proffered it.

MR. RICCIARDI: I filed it with the Court?

THE COURT: Yes.

MR. RICCIARDI: All right. Thank you, your Honor....

[Title omitted in printing]

SEPARATE JURY INSTRUCTIONS
(With Citations)

Defendant, Desert Palace, Inc. dba Caesars Palace Hotel & Casino, hereby submits Separate Jury Instructions which are not agreed upon by the parties. NOTE: The attached instruction "Plaintiff's Burden of proof" has been accepted by both parties. The Jointly Submitted Jury Instructions filed today erroneously contained an improperly modified version of the instruction. A copy of Plaintiffs original draft of the instruction is also attached.

DATED this 3 day of June, 1998.

RICCIARDI & ASSOCIATES

By: /s/ _____
Mark J. Ricciardi, Esq.
Nevada Bar No. 3141
2300 West Sahara Avenue #680 - Box 19
Las Vegas, NV 89102
Attorney for Defendant...

INSTRUCTION NO. _____

PLAINTIFF'S BURDEN OF PROOF - DISPARATE TREATMENT CLAIM UNDER TITLE VII

To prevail on a claim of intentional discrimination, the plaintiff must prove by a preponderance of the evidence that the defendant had a reason or motive to discriminate against her in the matter before this court. The plaintiff must prove, either directly or indirectly, that there is evidence of intentional discrimination. Direct evidence would include oral or written statements showing a discriminatory motivation for the defendant's treatment of the plaintiff. Indirect or circumstantial evidence would include proof of a set of circumstances that would allow one to reasonably believe that gender was a motivating factor in the defendant's treatment of the plaintiff.

Model Jury Instructions - Employment Litigation Section of Litigation - American Bar Association, Section 1.02[1] (1994)

42 U.S.C. §2000e-2(m); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1084, 67 L. Ed. 2d 207 (1981); Devit, Blackmar and Wolff, *Federal Jury Practice and Instructions* § 104.03 (1987 & Supp. 1993).

INSTRUCTION NO. _____

DEFENSES TO INDIRECT EVIDENCE OF DISCRIMINATION

In this case, the plaintiff must prove by a preponderance of the evidence that her sex was a motivating factor in the defendant's decision to discharge her. The plaintiffs sex was a motivating factor if you find that it played a role in the defendant's decision, even though other factors may have also played roles in that decision.

You must consider any legitimate, nondiscriminatory reason or explanation stated by the defendant for its decision. If you find that the defendant has stated a valid reason, then you must decide in favor of the defendant unless the plaintiff proves by a preponderance of the evidence that the stated reason was not the true reason but is only a pretext or excuse for discriminating against the plaintiff because of her sex.

The plaintiff can attempt to prove pretext directly by persuading you by a preponderance of the evidence that her sex was more likely the reason for the defendant's decision than the reason stated by the defendant.

The plaintiff can also attempt to prove that the defendant's stated reason for its decision to discharge is a pretext by persuading you that it is just not believable. However, it is not enough for the plaintiff simply to prove that the defendant's stated reason for its decision was not the true reason. The reason for this is that the plaintiff always must prove by a preponderance of the evidence that she was discharged because of her sex. Therefore, even if you decide

that the defendant did not truly rely on the stated reason for its decision to discharge, you cannot decide in favor of the plaintiff without further evidence that the defendant relied instead on the plaintiff's sex.

American Bar Association Model Jury Instructions, Employment Litigation §1.02(3)(a). 42 U.S.C. §2000e-2(m); McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Price Waterhouse v. Hopkins, 490 U. S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); International Brotherhood of Teamsters, 431 U. S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980), *cert. denied,* 454 U. S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986); Galbraith v. Northern Telecom, Inc., 944 F.2d 275 (6th Cir. 1991), *cert. denied,* 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Clark v. Huntsville City Board of Education, 717 F.2d 525 (11th Cir. 1983).

INSTRUCTION NO. _____

LEGITIMATE NONDISCRIMINATORY REASON

A legitimate nondiscriminatory reason is any reason or explanation unrelated to the plaintiffs sex. In considering the legitimate nondiscriminatory reason stated by the defendant for its decision, you are not to second-guess that decision or to otherwise substitute your judgment for that of the defendant.

In this case, the ultimate burden of persuading the jury that the defendant intentionally discriminated against the plaintiff because of her sex remains at all times with the plaintiff. The defendant is therefore not required to prove that its decision was actually motivated by the stated legitimate nondiscriminatory reason.

American Bar Association Model Jury Instructions, Employment Litigation §1.02(3)(b). 42 U.S.C. §2000e-2(k)(1)(C)(2); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watson v. Fort Worth Bank & Trust, 487 U. S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988); McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Galbraith v. Northern Telecom, Inc., 944 F.2d 275 (6th Cir. 1991), *cert. denied,* 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992); Thornbrough v. Columbus & Greenville Railway Co., 760 F. 2d 633 (5th Cir. 1985); Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1986); Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982); Elliott v. Group Medical & Surgical Service, 714

F.2d 556 (5th Cir. 1983), *cert. denied,* 467 U. S. 1215 (1984); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied,* 455 U. S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); Young v. City of Houston, 906 F.2d 177 (5th Cir. 1990); United States v. Town of Cicero, 785 F.2d 331 (7th Cir. 1986); Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied,* 450 U. S. 959 (1981).

[Title omitted in printing]

JURY INSTRUCTIONS

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

JURY INSTRUCTION NO. 1

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not

witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.

4 Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

JURY INSTRUCTION NO. 2

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

JURY INSTRUCTION NO. 3

You may use notes taken during trial to assist your memory, Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

JURY INSTRUCTION NO. 4

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;

2. the exhibits which have been received into evidence; and

3. any facts to which all the lawyers have agreed or stipulated.

JURY INSTRUCTION NO. 5

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness' memory;

3. the witness' manner while testifying;

4. the witness' interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness' testimony;

6. the reasonableness of the witness' testimony in light of all the evidence; and

7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

JURY INSTRUCTION NO. 6

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

JURY INSTRUCTION NO. 7

Section 2000e-2(a)(1) of Title 42 of the United States Code provides in part, that:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex.

JURY INSTRUCTION NO. 8

The plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. Costa suffered adverse work conditions, and

2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female.

If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

JURY INSTRUCTION NO. 9

You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

I will provide the jury with a form so that it can report a special interrogatory on the jury's finding on this question.

JURY INSTRUCTION NO. 10

If you find that the defendant discriminated against plaintiff based on her sex, then you must determine the amount of money that is fair compensation for plaintiff's damages. You may award compensatory damages only for injuries that the plaintiff proves were caused by defendant's allegedly wrongful conduct. The damages that you award must be fair compensation, no more and no less. In calculating damages, you should not consider any back pay that the plaintiff lost.

You may award damages for any pain, suffering, or mental anguish that plaintiff experienced as a consequence of the defendant's treatment of plaintiff. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

JURY INSTRUCTION NO. 11

The plaintiff must make every reasonable effort to minimize or reduce her damages for loss of compensation by seeking employment. This is called mitigation of damages.

If you determine that the plaintiff is entitled to damages, you must reduce these damages by (1) what the plaintiff earned, and (2) what the plaintiff could have earned by reasonable effort during the period from her discharge until the date of trial.

You must decide whether the plaintiff was reasonable in not seeking or accepting a particular job. However, the plaintiff must accept employment that is "of a like nature." In determining whether employment is "of a like nature," you may consider:

(1) The type of work,

(2) The hours worked,

(3) The compensation,

(4) The job security,

(5) The working conditions, and

(6) The other conditions of employment.

The defendant must prove that the plaintiff failed to mitigate her damages for loss of compensation.

If you determine that the plaintiff did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from her failure to do so. You must not compensate the plaintiff for any portion of her damages that resulted from her failure to make reasonable efforts to reduce her damages.

JURY INSTRUCTION NO. 12

If you find for plaintiff and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Plaintiff has made a showing beyond the threshold level of intent required for compensatory damages. An award of punitive damages is proper where defendant's illegal acts were willful and egregious, or displayed reckless disregard to plaintiff's rights. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient too their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the

relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

JURY INSTRUCTION NO. 13

You may not award plaintiff compensatory or punitive damages for any allegedly wrongful conduct by defendant which took place before November 21, 1991.

JURY INSTRUCTION NO. 14

A corporation such as Caesars Palace acts through its management and is responsible for the decisions and actions of its management and supervisory personnel in matters of this kind.

JURY INSTRUCTION NO. 15

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after your have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

If is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

JURY INSTRUCTION NO. 16

If it becomes necessary, during your deliberations to communicate with me, you may send a note through the marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone--including me--how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

JURY INSTRUCTION NO. 17

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict

form or forms and advise the court that you have reached a verdict.

GIVEN IN OPEN COURT this _____ day of June, 1998.

_____
UNITED STATES DISTRICT JUDGE

[Title omitted in printing]

VERDICT FORM
[Filed June 15, 1998]

We, the jury, duly impaneled and sworn upon our oaths, submit the following verdict:

1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?
Yes X No. __

NOTE: If you answered No to Question 1, your deliberations are complete and you need not answer any further questions. If you answered yes, please answer the following special interrogatory:

2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?
Yes X No. __

If your answer was "Yes", answer the next question. If your answer was "No", proceed to question No. 4.

3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?
Yes __ No. X

If you answered "Yes", stop and sign and date this form. If you answered "No", please continue.

4. What amount of financial loss do you find should be awarded to Plaintiff?
$ 64,377.74.

5. What amount of damages do you find should be awarded to Plaintiff for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life?
$ 200,000.00.

6. Was Defendant's violation willful and egregious or committed with reckless disregard to plaintiff's rights?
Yes X No. __

NOTE: If you answered No to Question 6, your deliberations are complete and you need not answer any further questions.

7. If you answered Yes to Question 6, what amount of damages do you find should be awarded to Plaintiff for punitive damages? $ 100,000.00.

/s/ _____
JURY FOREPERSON

6-15-98
Date

[Title omitted in printing]

MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL OR REMITTITUR

[Filed June 29, 1998]

Defendant, Desert Palace, Inc. dba Caesars Palace Hotel & Casino ("Caesars"), hereby files its Motion for Judgment as a Matter of Law pursuant to Rule 50(b) and in the alternative Motion for a New Trial or remittitur pursuant to Rule 59.

This Motion is based upon the Memorandum of Points and Authorities filed herewith, the papers and pleadings on file herein, any oral argument that may be presented to the Court and the following attached exhibits:*

1. Costa's doctors bills, Plaintiff's Trial Exhibits 60, 61 and 62.

2. Costa's NERC Charges, Plaintiffs Trial Exhibits 1 and 3.

3. Dr. Hoffman's Notes of 8/25/93, Plaintiff's Trial Exhibit 65.

I.

INTRODUCTION

After three days of jury trial and several hours of deliberation, the jury reached a verdict on June 15, 1998. The jury awarded Costa $64,377.74 in back wages, $200,000.00

in compensatory damages and $100,000.00 in punitive damages. On June 19, 1998, the Court entered an Amended Judgment in favor of Plaintiff, Catharina F. Costa ("Costa") and against Caesars.

As to the issue of Costa's termination, Caesars is entitled to judgment as a matter of law pursuant to Rule 50(b) because the evidence, considered as a whole and viewed in light most favorable to Costa reasonably can support only a verdict for Caesars. Costa's termination of employment was a discrete issue in the case and there is no substantial evidence supporting a verdict in favor of Costa on that issue. The lack of substantial evidence requires the same result whether or not the case is analyzed on a traditional disparate treatment theory or on the mixed motive theory on which the jury was instructed.[1]

There is also a lack of substantial evidence to support the punitive damage award to Costa. Specifically, there is no substantial evidence of the requisite egregious conduct necessary to support an award of punitive damages.

Whether or not the Court grants the motion for judgment as a matter of law on the termination, Caesars is entitled to a new trial because the compensatory damage award was excessive. Costa failed to present the minimum evidence necessary under the statute, the EEOC guidelines

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[1] Caesars duly objected to the mixed motive jury instruction at trial and by this argument does not waive that objection.

and the case law. Caesars is entitled to a new trial or remittitur.

II.

CAESARS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Rule 50(a)(1) states in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

A judgment as a matter of law need not be rendered on all issues in the case and the court may simply render judgment on certain of the issues. Rule 50(a)(1), NGO v. Reno-Hilton Resort Corporation, 140 F.3d 1299, 1304 (9th Cir. 1998), (judgment as a matter of law granted solely on punitive damages issue).

A judgment as a matter of law is appropriate where there is a lack of substantial evidence supporting a verdict in favor of the non-moving party. Gillette v. Delmore, 979 F.2d

1342, 1346 (9th Cir. 1992), *cert. denied* 510 U.S. 932, 114 S. Ct. 345 (1993).

A. Caesars is Entitled to Judgment As a Matter of Law as to The Issue of Whether Caesars Intentionally Discriminated Against Costa in Her Termination

In order to establish a *prima facie* case of discrimination, Costa must introduce evidence that gives rise to an inference of unlawful discrimination. Bradley v. Harcourt Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996).

Costa has failed to submit evidence supporting the *prima facie* case of employment discrimination because she has failed to show the necessary nexus between any alleged gender animus and the resulting decision to terminate her employment. See Wilson v. Stroh Companies, Inc., 952 F.2d 942, 945 (6th Cir. 1992).

Costa bears the initial burden of establishing a *prima facie* case of discrimination. Cordova v. Harrah's Reno Hotel-Casino, 707 F. Supp. 443, 446 (D. Nev. 1988) (citing McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973)). Even if Costa can establish a *prima facie* case, Caesars can rebut her claims by demonstrating that a legitimate, nondiscriminatory reason existed for her termination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Once Caesars rebuts the *prima facie* case, judgment in favor of Caesars is required unless Costa produces "specific, substantial evidence of pretext." Bradley, 104 F.2d at 270.

At trial, there was absolutely no dispute as to the following facts:

A. There were no witnesses to the incident in the elevator between Ms. Costa and Mr. Gerber.

B. Ms. Costa claimed that Mr. Gerber made physical contact with her.

C. Mr. Gerber claimed that Ms. Costa made physical contact with him.

D. At the time of the incident in the elevator, Mr. Gerber who had been employed for approximately 25 years, had no live suspensions whatsoever in his file, no discipline for any similar infractions regarding getting along with other employees; and in fact, had only minor counselings for parking matters and violation of break schedules.

E. At the time of the incident in the elevator, Ms. Costa had a history of written discipline for failure to get along with other employees. In particular, she had a live suspension that was issued on February 1, 1992. The suspension was for engaging in a verbal confrontation with co-worker, resulting in the use of profane and vulgar language - improper use of a pallet jack, Costa attempted to run into another employee. (Defendant's Exhibit D-14 at trial). The jury was not entitled to disregard this suspension because Costa did not file a timely charge of discrimination regarding the suspension with the Nevada Equal Rights Commission. Costa was required to file a charge of discrimination within 300 days of the alleged discriminatory action. 42 U.S.C.

§2000e-5(e)(1). Costa filed her first charge of discrimination on May 13, 1994, which is over 400 days too late to contest the suspension of February 1, 1992.

F. Ms. Costa's own union through representative Mike Riley, testified without contradiction that where there is an altercation between two employees, it is appropriate to look at the disciplinary history on each employee and it may be appropriate to give different levels of discipline to each employee. (This uncontroverted fact is also in accordance with the law. Stotts v. Memphis Fire Department, 858 F.2d 289, 299 (6th Cir. 1988) (In a case involving allegedly disparate discipline or allegedly discriminatory discharge, an employee's prior discipline record is the major, if not the most important factor)).

Costa raised no issue of pretext to overcome Caesars legitimate business decision to terminate her employment. The evidence was uncontroverted at trial that Assistant Warehouse Manager, Karen Hallett had taken actions which inflamed both male teamsters, as well as Ms. Costa. There was no evidence produced whatsoever to show that Ms. Hallett relied on any invalid or discriminatory prior discipline which would tend to prove that Caesars' proffered reasons for terminating Costa were pretextual. The mere fact that Hallett and Costa did not get along does not create evidence of pretext. Grimes v. Texas Department of Mental Health and Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996) (Evidence of mere dislike is not enough to prove pretext under Title VII).

Thus, Caesars is entitled to judgment as a matter of law with regard to the issue of Costa's termination and the

Court should set aside that portion of the jury' s verdict in the amount of $64,377.74 representing back wages.

B. Caesars is Entitled To Judgment As a Matter of Law As to the Issue of Punitive Damages

The Ninth Circuit has recently clarified the law regarding punitive damages under Title VII. An Asian-American female cocktail waitress was denied a leave of absence when she had complications with her pregnancy. A similarly situated white cocktail waitress was given two to three weeks off for her honeymoon. The jury concluded that the Reno-Hilton committed intentional discrimination based on national origin. However, the Honorable Howard T. McKibben granted the Reno-Hilton judgment as a matter of law on the plaintiffs punitive damage claim and the Ninth Circuit affirmed. Ngo v. Reno-Hilton Resort Corporation, 140 F.3d 1299, 1304 (9th Cir. 1998).

The Ninth Circuit explained that under Title VII, a plaintiff seeking punitive damages is required to make a showing beyond the threshold level of intent required for compensatory liability. The court held:

> Thus, to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment."

Id. at 1304 (quoting from Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985), *cert.denied* 471 U.S. 1117, 105 S. Ct. 2360(1985)).

The record is devoid of any evidence in this case that Caesars' management maliciously intended to discriminate against Costa and knew that doing so would be in reckless disregard of her federally protected rights. Glaringly absent from this trial (and found in cases where punitive damages have been affirmed), is direct evidence of hostility or animosity based upon gender.

Costa admitted at trial that no supervisor or manager ever remarked about her gender, joked about it or in any other way spoke about it. While friction between Costa and Assistant Warehouse Manager Karen Hallett, may have been related to personality issues or to the fact that Costa vigorously asserted her rights as a union steward, there was no evidence whatsoever of any gender based hostility by Caesars.

The uncontroverted evidence at trial was to the contrary. The one and only time that Costa reported concerns about not being treated the same as her fellow teamsters, Rich Stewart immediately referred her to Caesars EEO Officer Annelle Lerner. Ms. Lerner investigated the issues, met with Ms. Costa and specifically asked Ms. Costa for names of similarly situated males who she felt were being treated differently. Despite the fact that Costa did not come forward with any names, Lerner and Stewart looked into the matter and determined that there was no basis for the claim of sex discrimination. Nevertheless, Lerner advised Costa to come

back with any additional complaints or issues and they would be further investigated. Costa never returned to Annelle Lerner with further complaints.

At the highest levels of the company, when a legitimate problem or complaint was brought forward by Costa, it was resolved in her favor. When Costa received a improper suspension on an attendance issue, Vice President of Human Resources Teri Dodd promptly voided it.

Other circuits have agreed that even where a jury finds intentional discrimination, it is not always appropriate for a jury to award punitive damages: Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1216 (6th Cir. 1996) (although the actions of the defendant's employees were duplicitous and disclosed a lack of empathy, they did not rise to the level to support a punitive damages award); Karcher v. Emerson Electric Company, 94 F.3d 502 (8th Cir. 1996) *cert. denied* __ U.S. __ 117 S. Ct. 1692 (1977); (plaintiff's evidence that her employer required qualifications for particular jobs which excluded her from access to those jobs did not support a finding that the defendant acted with malice or deliberate indifference); Kolstad v. American Dental Association, 139 F.2d 958, 969-970 (DC Cir. 1998) (intentional discrimination in promotion, sexually offensive jokes at staff meetings, derogatory terms used to refer to prominent professional women - held not egregious conduct sufficient to form an adequate basis for punitive damages); Lindale v. Tokheim Corp., 1998 WL 272763 *6 (7th Cir. May 29, 1998) (punitive damages may not be awarded in a garden variety disparate treatment case with no circumstances of aggravation such as

the involvement of higher management or a pattern of flouting the law).

Thus, the Court should grant Caesars' Motion for Judgment as a Matter of Law and set aside the $100,000.00 in punitive damages awarded by the jury.

III.

CAESARS IS ENTITLED TO A NEW TRIAL OR REMITTITUR BECAUSE THE VERDICT ON COMPENSATORY DAMAGES WAS EXCESSIVE

Where a court, after viewing the evidence concerning damages in a light most favorable to the prevailing party determines that the damages award is excessive, it must either grant defendant's motion for a new trial or deny the motion conditional upon the prevailing party accepting a remittitur. Fenner v. Dependable Trucking Company, Inc., 716 F.2d 598, 603 (9th Cir. 1983). The court may also order a new trial where the verdict is against the manifest weight of the evidence. Kern v. Levolor Lorentzen, 899 F.2d 772, 778 (9th Cir. 1990).

A. Title VII Requires Specific Types of Evidence to Support a Compensatory Damage Award

Prior to the Civil Rights Act of 1991, plaintiffs in Title VII discrimination cases could claim only back wage and certain out-of-pocket damages. After November 21, 1991, Title VII claimants could also claim compensatory damages.

42 U.S.C. § 1981a; Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S. Ct. 1483, 1508 (1994).

The EEOC, as the primary enforcement mechanism against discrimination under Title VII, interpreted the 1991 Amendments allowing compensatory damages under Title VII and issued EEOC Policy Guidance No. 915.002 § II(A)(2) (July 14, 1992). The Commission's position statement noted that "[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used as guidance in analyzing the availability of damages under § 1981a. Section 1981 cases are particularly useful because Congress treated the § 198la damage provisions as an amendment to § 1981." Id. at 10 n. 13. The Commission then explained its position on the availability of damages for emotional harm under § 1981 a as follows:

> Nonpecuniary losses for emotional harm are more difficult to prove than pecuniary losses. Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches... The Commission will typically require medical evidence of

> emotional harm to seek damages for such harm in conciliation negotiations .... There should be corroborating testimony by the complaining party's supervisor, family, friends or anyone else with knowledge of the emotional harm.

Id. at 10-12 (footnotes omitted) (emphasis added).

B. Costa Failed to Provide Corroborating Evidence of Emotional Harm and Medical Proof of Emotional Harm

Costa provided only two scant pieces of evidence relating to emotional harm. She testified that she felt terrible about her treatment at Caesars and could not bear to go to work. She then presented medical bills for three visits to a family practitioner for treatment for headaches. See, Exhibit 1, attached. (The Court should note that it is undisputed that Costa had a history of migraine headaches dating back to 1986, a year before she joined Caesars, see Section III, C below).

Costa presented no corroborating evidence by her family, friends or anyone else with knowledge of her emotional harm. Furthermore, Costa presented no evidence whatsoever of having sought psychological or psychiatric examination, treatment or counseling. Costa put on no evidence whatsoever of any permanent or continuing emotional or psychological problems; and on the contrary, she stated that she felt great when she left Caesars and has not had another headache since. Costa is fully able to work as a teamster, and in the event there were full-time work as a

warehouse person available, she would do it. In fact, Costa is working as a teamster in the convention industry on a casual basis right now. The length of time that Costa allegedly was subjected to treatment causing emotional harm is also very short. In both of her charges of discrimination filed with the Nevada Equal Rights Commission, Costa set forth, under oath, that the sexual discrimination against her began in August of 1993. See, Exhibit 2, attached. She left Caesars about one year later, in August of 1994. Based upon the scant evidence of emotional harm presented by Costa at trial, $200,000.00 is far in excess of any amount she might reasonably be entitled to. Where a verdict is grossly excessive, it cannot be upheld. Hughes v. Electronic Data Systems, 976 F. Supp. 1303, 1308 (D. Az. 1997) (held compensatory damage verdict of $200,000.00 is grossly excessive).

C. The $200,000.00 Verdict is Out of Line With Other Reported Verdicts

Caesars has surveyed the compensatory damage awards under Title VII reported in the Ninth Circuit from the date the Civil Rights Act of 1991 became effective to the current date.

The awards ranged from a low of $10,000.00, Odima v. Weston Tucson Hotel, 53 F.3d 1484, 1498 (9th Cir. 1995) to a high of $285,000.00, Simpson v. Lucky Stores, Inc., 1993 WL 414668 at * 1 (9th Cir. October 6, 1993).

The Simpson award has not been attacked at the trial court level or appealed in any reported case, and there is no

language in the court's order adopting the verdict which indicates what evidence the jury relied on to make its damage award. Similarly, where a jury awarded a plaintiff $195,000.00 in compensatory damages, there is no discussion in reported cases of what psychiatric evidence there may have been at trial, however, the court specifically observed that the plaintiff had taken a three month leave of absence from work based upon stress. Mockler v. Multnomah County, 140 F.3d 808, 810, 812 (9th Cir. 1998).

However, in each and every other reported case where a large damage award has been upheld, the award was supported by psychiatric testimony. Barfield v. Chevron. U.S. Inc., 1997 WL 9888 at *31 (N.D. Ca. January 2, 1997), ($192,000.00 for one plaintiff and $176,000.00 for another plaintiff, both of which were supported by corroborated psychiatric testimony and records).

Even much smaller compensatory damage awards have been supported by psychiatric testimony. Bartlett v. U.S., 835 F. Supp. 1246, 1265 (E. D. Wash. 1993) ($25,000.00 - supported by psychiatric testimony); Meadows v. Guptill, 856 F. Supp. 1362, 1370-71 (D. Az. 1993) ($50,000.00 - involved sexual harassment and offensive touching - supported by psychiatric testimony).

Costa testified at trial that she feels good and never had another headache after the day she left Caesars. In a similar case, the court awarded compensatory damages in the amount of $5,000.00 where there was no permanent or lasting psychological damage. Johnson v. Good Year Tire and

Rubber Company, 790 F. Supp. 1516, 1529-30 (E. D. Wash. 1992).

The legislative history of the Civil Rights Act of 1991 shows that Congress sought to unify the law for employment discrimination cases. Therefore, it is useful to consider decisions rendered under the other federal civil rights statutes where compensatory damages have been awarded. Patterson v. PHP Health Care Corporation, 90 F.3d 927, 940 (5th Cir. 1996) *cert. denied* __ U.S. __, 117 S.Ct. 767 (1997).

Although the Ninth Circuit has affirmed jury awards as high as $300,000.00 in Section 1981 or 1983 cases, the awards generally are supported by psychiatric testimony or other medical evidence of psychiatric damage. Brady v. Gebbie, 859 F.2d 1543, 1557-58 (9th Cir. 1988) *cert. denied* 489 U.S. 1100, 109 S. Ct. 1577 (1989) ($300,000.00 found not excessive where there was ample testimony by plaintiff's psychiatrist to show emotional distress and psychological damage and permanent psychological damage that would require treatment for several years); Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1373, 1376 (9th Cir. 1990) vacated on other grounds, 501 U.S. 1201, 111 S. Ct. 2791 (1991) (under Oregon state sex discrimination law - $100,000.00 in general damages - plaintiff had ongoing and regular treatment by a psychologist and after discharge became depressed, suffered eating and sleeping disorders and had psychological difficulty returning to the work force).

In a case under the Arizona Civil Rights Act, the court set aside a compensatory damage award of $200,000.00

because it was excessive. The plaintiff had no psychological damage and the court observed the following:

> Hughes is fully capable and functioning as he did before his termination; he suffers no permanent disability as a result of his termination. In fact, he has a part-time position at a school for the deaf which he finds enjoyable and rewarding. He is capable of performing the duties of that position if it was available full-time.

Hughes v. Electronic Data Systems, 976 F. Supp. 1303, 1308 (D. Az. 1997).

Similarly in the case at bar, Costa testified that she never had another headache after leaving Caesars, and she is now fully capable of working as a warehouse person; and is in fact, working in a teamster occupation in the convention industry.

In another case under Section 1983, a jury awarded $60,000.00 in general compensatory damages for emotional distress suffered by a fire fighter who was terminated. The district court found that $60,000.00 was an excessive award for emotional distress and offered the plaintiff the choice of a new trial or a remittitur reducing the damages to $30,000.00. Gillette v. Delmore, 979 F.2d 1342, 1345-46 (9th Cir. 1992) *cert. denied,* 510 U.S. 932, 114 S. Ct. 345 (1993).

One other large compensatory damage award under Section 1983 which was affirmed by the court specifically

stated that even though there may not have been substantial evidence of sex discrimination to support the verdict, there was substantial evidence of a due process violation which did support the verdict. Roberts v. College of the Desert, 870 F.2d 1411, 1417 (9th Cir. 1989) ($200,000.00 compensatory damages). In the case at bar, there were no constitutional claims and the entire case rested on a claim of sexual discrimination.

Courts in other circuits have grappled with excessive damage awards and have used a similar analysis to that used in the Ninth Circuit. A plaintiff in a racial and sexual discrimination law suit sought $250,000.00 in compensatory damages. The court did its own independent survey of reported compensatory damages awards in employment cases and found that the plaintiff was entitled to $100,000.00 in light of the fact that he had submitted psychiatric evidence from his doctor regarding his psychological and emotional problems. Shepard v. American Broadcasting Companies, 862 F. Supp. 486, 496 n.20, 497-98 (D. C. 1994) vacated on other grounds 62 F.3d 1469 (D.C. Cir. 1995).

An award of $40,000.00 for emotional distress to a prevailing plaintiff in a discrimination case was vacated by the United States Court of Appeals for the Fifth Circuit. Patterson v. PHP Health Care Corporation, 90 F.3d 927, 940 (5th Cir. 1996), *cert. denied* __ U.S. __, 117 S. Ct 767 (1997). The plaintiff testified that he felt "frustrated" and "real bad" for being judged by the color of his skin. He explained that the working environment was "unbearable" and was "tearing my self esteem down." He also stated that it made him "hurt" and made him "angry" and "paranoid" to

know that his supervisor referred to him as a "porch monkey" or a "nigger" and generally thought that he was inferior to white employees. The court vacated the $40,000.00 emotional distress award despite the fact that the district court could infer that being referred to as a "porch monkey" and a "nigger" would cause one emotional distress. However, the court held that since the plaintiff had not presented evidence as to any specific manifestation of harm listed by the EEOC policy statement and presented no corroborating testimony nor any expert medical or psychological evidence of damages, the award of $40,000.00 was excessive and not supported by the evidence. Id. at 939.

Similarly in the case at bar, Costa testified that she felt "terrible" whenever she had to go to work and that she dreaded going to work. She alleged that she felt she was being treated differently than the "guys." However, she presented no corroborating testimony whatsoever as to her emotional distress and sought no psychological or psychiatric counseling whatsoever. She visited her family doctor (not a psychiatrist or psychologist) on three occasions for headaches. However, the uncontroverted medical evidence is that she had a history of migraine headaches as early as 1986, which was at least one year before she even started working at Caesars. See, Exhibit 3 (Dr. Hoffman's notes of 8/25/93 - "Hx of migraine 1986"), attached.

IV.

CONCLUSION

Caesars requests that the Court grant judgment as a matter of law as to the issue of Costa's termination and as to the issue of punitive damages. In the event the Court does so, a new trial on the issue of compensatory damages would be warranted.

Whether or not the Court grants the Motion for Judgment as a Matter of Law, the compensatory damage award is clearly excessive, and the Court should order a new trial. As an alternative, the Court could order Plaintiff to choose between a lower amount on remittitur or a new trial.

DATED this 29th day of June, 1998.

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* Attached exhibits omitted in printing.

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In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON THE MERITS FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that direct evidence is not required in Title VII cases to trigger the application of the "mixed-motive" analysis set out in *Price Waterhouse v. Hopkins*?

2. What are the appropriate standards for lower courts to follow in making a direct evidence determination in "mixed-motive" cases under Title VII?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment Corporation which is a publicly traded corporation. Park Place Entertainment Corporation is unaware of any publicly traded company that owns 10 percent or more of its stock.

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2. The record facts in *Price Waterhouse* provided extraordinary circumstances that supported a burden-shifting framework and, by implication, established a high threshold for doing so. 34

3. Justice O'Connor's concurring opinion explicitly set a high standard for burden-shifting; only direct evidence that an illegitimate criterion was a substantial factor in the challenged decision suffices; comments by non-decisionmakers, unrelated comments by decisionmakers, and stray remarks are insufficient. 36

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OPINIONS BELOW

The August 2, 2002, *en banc* opinion of the United States Court of Appeals for the Ninth Circuit is reported at 299 F.3d 838 (9th Cir. 2002) and is reprinted in the Appendix to the Petition for Writ of Certiorari "Pet. App." at 1a - 53a. The October 2, 2001, Ninth Circuit panel opinion is reported at 268 F.3d 882 (9th Cir. 2001) and is reprinted at Pet. App. 54a - 69a. The January 28, 1999, order of the United States District Court for the District of Nevada is reprinted at Pet. App. 70a - 87a.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its *en banc* opinion on August 2, 2002. The Petition for Writ of Certiorari was filed on October 31, 2002, and was granted on January 10, 2003. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166) ("Title VII"), 29 U.S.C. § 2000e *et. seq.*, specifically 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m) and 2000e-5(g)(2)(B). These sections of Title VII are set forth in Appendix A to this brief.

STATEMENT OF THE CASE

I. Overview of the Case.

Petitioner Caesars hired Respondent Catharina Costa in 1987. During the next seven years, Costa received many warnings and suspensions because of altercations with her co-

workers. In 1994, there was another altercation, this time with a twenty-five year employee with a good disciplinary record. Caesars terminated Costa and suspended her co-worker for five days. Costa sued, claiming gender discrimination in violation of Title VII.

Though the record was devoid of direct evidence of discrimination, the district court instructed the jury under a mixed-motive framework rather than under the appropriate pretext framework. The jury returned a verdict against Caesars, and Caesars appealed. The Ninth Circuit panel held that the district court committed reversible error by giving a mixed-motive jury instruction in the absence of direct evidence of discrimination. The panel decision was vacated, and a 7-4 majority of the *en banc* Ninth Circuit ruled that direct evidence is not required to trigger a mixed-motive analysis in Title VII cases. The *en banc* majority holding directly conflicts with the Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and, as noted by the *en banc* dissent, places the Ninth Circuit "in conflict with almost all others." Pet. App. 51a.

II. Statement of Facts.

Costa worked in Caesars' warehouse where she operated a forklift to deliver bulk food orders. Though she was the only female warehouse employee in her collective bargaining unit, other women regularly worked in and around the warehouse. Costa Tr. 26: 22-24, Tr. 27: 6-22; Hallett Tr. 509: 9-11; Def. Exh. 37, Tr. 200.

Costa had a long history of *not* getting along with co-workers. In a fit of anger in her first year at Caesars, she threw a roll of tape at another employee and broke a window in the warehouse. In September 1990, she verbally harassed

another employee. Costa received disciplinary warnings for each of these incidents. Def. Exhs. 2 and 4, Tr. 200.[1] In July 1991, she had a loud confrontation with a co-worker in which they hurled vulgar, insulting names. Although Costa's disciplinary record at the time was worse, *compare* Def. Exhs. 2 and 4, Tr. 200 with Def. Exh. 37, Tr. 200, Warehouse Manager Lou Wood suspended both Costa and the co-worker for three days. Def. Exh. 8, Tr. 200; Costa Tr. 223: 2-6. Costa herself acknowledged that Wood tried to be fair, and he did not treat her worse than he treated her male co-workers. Costa Tr. 224: 23-25, 225: 1.

Six months later, in January 1992, Costa had another verbal confrontation with another warehouse co-worker. Each used vulgar, insulting language, and Costa tried to hit the co-worker with a pallet jack. Costa and the male co-worker each received five-day suspensions. Costa's union grieved the suspension. The union settled the grievance on Costa's behalf with an agreement to reduce her suspension to two and one-half days. The reduced suspension could still be relied upon, however, to support further discipline, up to and including termination. A different union which represented the co-worker settled with Caesars on the same terms. Def. Exhs. 14 and 23, Tr. 200; Riley Tr. 392: 24-25, 393: 1-3; Stewart Tr. 415: 9-17.

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[1] Caesars compiled the disciplinary records of warehouse employees for the period 1987 through July 1996. Tr. 199:14-25. The compilation is organized by file letter code, employee name, gender, date, type of infraction and disciplinary action taken. *See* Def. Exh. 37, Tr. 200.

In September 1992, Costa was rude to a co-worker and belligerent to a supervisor and received another written warning. Def. Exh. 16, Tr. 230.

In December 1993, Costa used profanity and ethnic slurs against a co-worker and endangered the co-worker with her forklift. This time Caesars suspended her for 30 days. Her union grieved the suspension. Without reaching the merits of the grievance, the arbitrator overturned the suspension because Caesars had failed to introduce the work rules into evidence at the arbitration hearing. Pl. Exh. 52, Tr. 170; Stewart Tr. 417: 20-25, 418: 1-2, 23-25, 419: 1-5.

In August 1994, Costa engaged in the altercation that resulted in her termination. This time, the co-worker was Herbert Gerber, a twenty-five year employee who, unlike Costa, had never received a disciplinary suspension and had no history of altercations with other employees. Stewart Tr. 426: 3-25, 427: 1. Costa claimed Gerber hit her; Gerber said Costa pushed him. There was physical evidence of contact, but no witnesses to the incident. Costa Tr. 237: 2-5; Joint Appendix ("J.A.") 6-7 [Costa Tr. 233-34]; Stewart Tr. 421: 16-25, 422: 1, 424: 17-22.

Without corroborating witnesses, Caesars' usual practice was to discipline both employees participating in an altercation. However, as Costa's union representative testified, Caesars would not necessarily impose equal discipline on each employee. Stewart Tr. 424: 23-25, 425: 1-12; Riley Tr. 387: 16-22. Instead, Caesars' practice was to consider all circumstances, including an employee's length of service and past record. Stewart Tr. 425: 6-12.

Caesars suspended Gerber for five days. Caesars chose to suspend rather than terminate his employment

because of his twenty-five years of service, his relatively clean disciplinary record (Gerber had never been suspended), and the absence of any history of failing to get along with co-workers. Stewart Tr. 426: 3-25, 427: 1.

Caesars terminated Costa. In choosing termination, Caesars considered her poor disciplinary record, and in particular her two prior suspensions for similar infractions. Def. Exhs. 8, 14 and 23, Tr. 200; Stewart Tr. 425: 15-25, 426: 1-2. Caesars' collective bargaining agreement with Costa's union permits Caesars to terminate an employee only for "just cause." Pl. Exh. 76, p. 30, Tr. 201. The union grieved the termination, but lost: the arbitrator ruled that Caesars terminated Costa for just cause. Pet. App. 7a.[2]

Having failed to persuade an arbitrator, Costa brought an action against Caesars under Title VII. Costa claimed she was terminated because of her gender, and that male co-workers were treated less harshly in similar circumstances. Pl. Exhs. 39-49 and 54, Tr. 198, 402.

On the issue of animus, Costa offered only two pieces of evidence that she characterized as gender-based remarks by members of management. One witness said supervisor Karen Hallett, a *woman*, referred to Costa as a "bitch." J.A. 11-12 [Graham Tr. 298-99]. And, Costa testified that supervisor Wayne Bach denied her overtime once because a co-worker "had a family to support." J.A. 8-9 [Costa Tr. 249]. Costa offered no evidence that Hallet's use of the word "bitch" connoted anything more than Hallet's personal dislike for Costa, or that Hallet had directed the remark at women in

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[2] The district court excluded from evidence the arbitration decision. Pet. App. 44a-45a.

general. As for the incident involving assignment of overtime, Costa admitted that neither Bach nor Hallett said anything connecting the decision to her gender or to the gender of the co-worker. J.A. 8-9 [Costa Tr. 249]. Costa had no family to support. Costa Tr. 249: 21-23.

The rest of Costa's alleged evidence of gender-based, disparate treatment came in the form of anecdotal stories:

(a) On one occasion a male supervisor walked into a room where Costa and several of her co-workers were eating soup. The supervisor said to Costa, "Don't you have work to do?" Costa Tr. 44: 8-15. No discipline resulted. The supervisor, Hugh Roth, was not involved in Costa's termination.

(b) Another supervisor, Bill Meredith, pressured Costa to fill out a United Way pledge card, Costa Tr. 57: 2-20, and was "disrespectful" to her. Costa Tr. 56: 20-25, 57: 1. He made no gender-based comments. He was not involved in her termination. When asked why she believed Meredith's treatment was discriminatory, Costa answered: "Because that was the way Bill Meredith was." Costa Tr. 56: 1-3.

(c) According to Costa, supervisors Roth and Meredith would not allow her to take breaks in the receiving office, whereas others were permitted to do so. Costa Tr. 210: 24-25, 211: 1-25, 212: 1-4. No discipline resulted. Again, neither supervisor was involved in her termination. Stewart Tr. 480: 15-25, 481: 1-3.

(d) According to Costa, supervisor Karen Hallett followed her around. Costa Tr. 146: 13-24. Other employees, all men, also complained that Hallett followed

them too. Stewart Tr. 431: 18-25; Hallett Tr. 536: 17-25, 537: 1-2, 562: 5-15.

(e) According to Costa, her supervisors did not fairly assign overtime. J.A. 8 [Costa Tr. 248]. Several of her co-workers, all males, made similar complaints. J.A. 13 [Dudenake Tr. 335]; Thomas Tr. 328: 23-25, 329: 1-3; J.A. 15 [Whitaker Tr. 348, Cornaggia Tr. 337].

At trial, Caesars objected to giving the jury a *Price Waterhouse* mixed-motive instruction, arguing that Costa had not produced direct evidence of discrimination. J.A. 16-17 [Tr. 460-61]; J.A. 24-25; Pet. App. 58a. Caesars requested pretext instructions. *Id.* Over the objection of Caesars, the district court gave the following "mixed-motive" jury instruction:

> *You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex* and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly

even if the plaintiff's gender had played no role in the employment decision.

Pet. App. 33a-34a (emphasis added).[3]

No doubt influenced by the first sentence of the instruction, the jury answered the first question on the verdict form as follows:

> Do you find that Defendant Caesars Palace violated the Civil Rights Act *in that Plaintiff's gender (sex) was a motivating factor* in any adverse condition of plaintiff's employment?
>
> Yes _X_ No ____

J.A. 40 (emphasis added).

III. Proceedings Below.

The jury reached a verdict and awarded Costa back wages of $64,377, compensatory damages of $200,000 and punitive damages of $100,000. J.A. 40. The district court denied Caesars' motion for judgment as a matter of law on Costa's termination and on the award of punitive damages. Pet. App. 56a 72a-78a. The district court granted Caesars' motion for a new trial or remittitur, and Costa accepted a reduced compensatory damages award in the amount of $100,000. *Id.* at 7a, 78a and 86a. The district court also awarded Costa attorney's fees and costs. *Id.* at 84a-87a.

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[3] Neither party requested this specific instruction.

On appeal, the Ninth Circuit panel reversed, holding that the district court's mixed-motive jury instruction impermissibly shifted the burden of proof on causation to Caesars. Citing *Price Waterhouse* and several circuit court decisions, the panel held that a mixed-motive instruction is allowed only when a Title VII plaintiff produces "direct and substantial evidence of discriminatory animus." Pet. App. 59a - 65a. The panel held that Costa did not produce such evidence. *Id.*

The Ninth Circuit granted Costa's petition for a rehearing *en banc*. In a 7-4 decision, the *en banc* majority held that the district court properly gave the mixed-motive jury instruction, shifting the burden of proof on causation to Caesars. The *en banc* majority did not find that Costa had presented direct evidence of discrimination; rather, it held that direct evidence of discrimination is not required to trigger the burden-shifting framework.

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred in holding that direct evidence is not required to trigger the mixed-motive analysis in Title VII cases. Justice O'Connor's concurring opinion in *Price Waterhouse* requiring direct evidence to trigger the application of the mixed-motive analysis is the holding of that case. The Ninth Circuit's conclusion that the Civil Rights Act of 1991 ("CRA 1991") "wholly abrogated" the premise for the direct evidence requirement is erroneous. The text of CRA 1991 does not show any intent by Congress to disturb the direct evidence requirement. The legislative history of CRA 1991 confirms Congress' intent to overrule only one aspect of the *Price Waterhouse* decision, namely, that an employer who prevails on the same-decision defense does not escape liability altogether. The Ninth Circuit's rejection of the direct

evidence requirement based on a flawed analysis of CRA 1991 and its legislative history adds confusion to the law. The Ninth Circuit's decision should be overturned on these grounds alone.

There are compelling reasons for the Court to reaffirm that direct evidence is required to trigger the mixed-motive analysis. Absent direct evidence to trigger the mixed-motive analysis, the burden of proof on causation will be shifted to the employer in virtually all Title VII cases, disturbing the careful *McDonnell Douglas/Burdine* framework established by the Court. Retention of the direct evidence requirement is also necessary to maintain the balance of rights of employers and employees under Title VII.

The direct evidence required to trigger the burden-shifting framework of *Price Waterhouse* must meet a high standard. *Price Waterhouse* implicitly and explicitly establishes a high standard for the required evidence, and most circuit courts have adopted a high standard as a prerequisite to burden shifting. The circuit courts, however, have defined direct evidence in different ways, causing confusion in the application of *Price Waterhouse*. Caesars urges the Court to adopt the approach applied by the First Circuit in *Febres v. Challenger Caribbean Corp.*

ARGUMENT

I. Direct Evidence Is Required in Title VII Cases to Trigger the Application of the Mixed-Motive Analysis.

A. The *Price Waterhouse* holding requires direct evidence to trigger the application of the mixed-motive analysis.

Disparate treatment claims under Title VII can be proven by direct or circumstantial evidence. "As in any lawsuit, [a Title VII] plaintiff may prove his case by direct or circumstantial evidence." *Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Direct evidence of intentional discrimination is, however, "hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). *See also Aikens,* 460 U.S. at 716 ("there will seldom be 'eyewitness' testimony as to the employer's mental processes."); *Fernandes v. Costa Brothers Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("direct evidence is relatively rare"); *Scott v. University of Miss.*, 148 F.3d 493, 504 (5th Cir. 1998) ("Because direct evidence is rare in discrimination cases, a plaintiff must ordinarily use circumstantial evidence to satisfy her burden of persuasion.").

The Court established a framework for analyzing the typical circumstantial evidence case brought under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later reaffirmed it in *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). The *McDonnell Douglas/Burdine* framework is a three-step, burden-shifting method to prove intentional discrimination in the absence of direct evidence. The first step requires the plaintiff to

establish a prima facie case of discrimination. This is not an "onerous" burden; it involves the elimination of the most common, nondiscriminatory reasons for an adverse employment action. *Burdine*, 450 U.S. at 256.[4] Once a prima facie case is established, an inference of discrimination arises. The burden of production, but not proof, then "shifts to the employer to articulate some legitimate, nondiscriminatory reason for [the adverse action]." *McDonnell Douglas*, 411 U.S. at 802. If the employer makes such a showing, the burden shifts to the plaintiff to prove that the articulated reason is pretextual. *Burdine*, 450 U.S. at 253-55.

The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 256. Under the *McDonnell Douglas* procedure it never is the employer's burden to prove the absence of discriminatory motive. *Board of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 29-30 (1978). Until 1989, an employer in a Title VII disparate treatment case did not bear the burden of persuasion on causation under any circumstances.

In 1989, the Court in *Price Waterhouse* approved a mixed-motive analysis for Title VII cases that in narrow circumstances shifts the burden of persuasion on causation to the employer. The *Price Waterhouse* plurality opinion[5] states

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[4] "As should be apparent, the entire purpose of the McDonnell Douglas prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring).

[5] Opinion by Justice Brennan, in which Justices Marshall, Blackmun and Stevens joined.

that when mixed-motives drive an employment decision, the *McDonnell Douglas/Burdine* analysis does not apply. *Price Waterhouse*, 490 U.S. at 245-47 (Brennan, J., plurality opinion). If the plaintiff proves that an unlawful factor "played a motivating part in an employment decision," the burden of persuasion shifts to the employer to prove by a preponderance of the evidence that the same decision would have been made absent the unlawful factor. *Id.* at 258.[6]

The plurality opinion in *Price Waterhouse* did not describe precisely what evidence would suffice to shift the burden of persuasion to the employer in a mixed-motive case.

> [W]e do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case.

Id. at 251-52.

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[6] The plurality also stated that when an employer carries its burden of proof on the same-decision defense, it avoids liability outright. *Id.* This part of the opinion was superseded by Section 107 of the 1991 amendments to Title VII, 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B). The 1991 amendments allow limited remedies even when the employer succeeds in proving the same-decision defense. As demonstrated *infra*, the 1991 amendments did not alter the nature of the evidence necessary to trigger a mixed-motive analysis.

The *Price Waterhouse* dissent[7] asserted that the *McDonnell Douglas/Burdine* evidentiary scheme fully addressed the different measures through which a plaintiff could prove illegal discrimination, without shifting the burden of persuasion to the employer in any disparate treatment case. *Id.* at 279-80, 288 (Kennedy, J., dissenting). Justice White concurred in the judgment, but his concurring opinion would apply the *Mt. Healthy*[8] approach to causation and require the plaintiff to show that "the unlawful motive was a *substantial* factor in the adverse employment action." *Id.* at 259 (White, J., concurring).

Justice O'Connor's concurring opinion agreed with the plurality's burden-shifting approach but specified that a heightened evidentiary showing was necessary to trigger the mixed-motive analysis. *Id.* at 262, 276-77 (O'Connor, J., concurring). Justice O'Connor wrote separately in part to "express my views as to when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262. Specifically, Justice O'Connor's concurrence stated that a mixed-motive/burden-shifting analysis is triggered only by "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277 (emphasis added).

The concurring opinion of Justice O'Connor in *Price Waterhouse* that requires direct evidence to trigger the mixed-motive analysis is the holding of the Court. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented court

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[7] Opinion by Justice Kennedy, in which Chief Justice Rehnquist and Justice Scalia joined.

[8] Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . . ."). Applying the principle of *Marks* to *Price Waterhouse*, Justice O'Connor's concurring opinion, which requires direct evidence as the evidentiary prerequisite to a mixed-motive analysis, is the narrowest ground supporting the judgment of the Court. Justice O'Connor's concurrence shifts the burden of causation to the employer in mixed-motive cases only where the plaintiff meets a high evidentiary standard and presents direct evidence of discrimination.

The Third Circuit analyzed this issue and concluded that:

> Justice O'Connor's concurrence in *Price Waterhouse* limited the scope of the plurality's holding . . . by setting forth the predicate necessary to trigger the shift in the burden of persuasion . . . only plaintiffs who "demonstrate[ ]" with "sufficiently direct" evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion.

Watson v. Southeastern Pa. Transp. Auth., 207 F.3d 207, 215 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001), *quoting Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring). *Accord*, *Fernandes v. Costa Brothers Masonry*, 199 F.2d 572, 580 (1st Cir. 1999) ("[W]hen the Supreme Court rules by means of a plurality opinion (as was true in *Price Waterhouse*), inferior courts should give effect to the narrowest ground upon which a majority of the Justices

supporting the judgment would agree. [Citation to *Marks* omitted.] The O'Connor concurrence fits this profile.")[9]

The *Price Waterhouse* dissent considered Justice O'Connor's concurring opinion as the holding of the Court. The dissenting opinion read the holding in *Price Waterhouse* as shifting the burden of persuasion to the employer only "in a limited number of cases" where the "plaintiff proves by *direct evidence* that an unlawful motive was a substantial factor actually relied upon in making the decision." *Price Waterhouse*, 490 U.S. at 280 (Kennedy, J., dissenting) (emphasis added). The dissenting opinion also noted that "the Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue." *Id.* at 290.

The Ninth Circuit's conclusion that the direct evidence requirement was a mere "passing reference," Pet. App. 16a-17a, and not the holding in *Price Waterhouse* is wrong and conflicts with almost all other circuit courts. *See infra*, Argument Section I.B.3. The Ninth Circuit's further conclusion that CRA 1991 "wholly abrogated" the premise for Justice O'Connor's concurrence, Pet. App. 16a-17a, is also wrong.

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[9] As demonstrated in Argument Section I.B.3. *infra*, almost all circuit courts apply Justice O'Connor's concurring opinion and require "direct evidence" to trigger application of the mixed-motive analysis. *But see Thomas v. National Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . , so that it is far from clear that [it] should be taken as establishing binding precedent."), *vacated in part on reh'g*, 1998 U.S. App. LEXIS 3634 (D.C. Cir. 1998).

B. The Civil Rights Act of 1991 did not abrogate the *Price Waterhouse* direct evidence requirement.

1. The plain language of CRA 1991 does not show that Congress rejected or overruled the *Price Waterhouse* direct evidence requirement.

CRA 1991 "is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964." *Landgraf v. USI Film Prods., et al.*, 511 U.S. 244, 250 (1994). The Court in *Landgraf* noted that Section 107 of CRA 1991[10] responds to *Price Waterhouse* "by setting forth standards applicable in 'mixed motive' cases . . . ." *Id.* at 251. CRA 1991 overruled only one aspect of *Price Waterhouse*. Before CRA 1991, an employer that prevailed on the same-decision defense in a mixed-motive case avoided liability altogether. *Price Waterhouse*, 490 U.S. at 254, 258 (Brennan, J., plurality opinion). After CRA 1991, an employer that prevails on the same-decision defense no longer avoids liability altogether. 42 U.S.C. § 2000e-2(m) and § 2000e-5(g)(2)(B).[11] These statutory amendments are silent altogether with respect to the *Price Waterhouse* holding that direct evidence is required to trigger a mixed-motive case in the first place. Nothing in the text of CRA 1991 suggests that Congress intended to disturb the direct evidence requirement.

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[10] Codified at 42 U.S.C. § 2000(e)-2(m) and § 2000(e)-5(g)(2)(B).

[11] 42 U.S.C. § 2000e-5(g)(2)(B)(i) provides that an employer that prevails on the same-decision defense may nevertheless be liable for declaratory relief, injunctive relief, attorney's fees and costs.

The Third Circuit considered the effect of CRA 1991 on the *Price Waterhouse* direct evidence requirement in *Watson*, *supra*. The *Watson* court analyzed the text of Section 107(a) of CRA 1991 and concluded that CRA 1991 altered only the scope of the same-decision defense in mixed-motive cases - - i.e., after CRA 1991 an employer no longer escapes liability altogether by prevailing on the same-decision defense. *Watson*, 207 F.3d at 216. The *Watson* court then concluded that "Section 107(a) does not, at least on its face, alter the other significant holding of *Price Waterhouse* set forth in Justice O'Connor's concurrence - - i.e., the distinction drawn between 'pretext' and 'mixed-motive' cases and the evidentiary showing necessary to trigger a shift in the burden of persuasion with respect to causation." *Id.*

The Tenth Circuit also analyzed Section 107 of CRA 1991 in *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545 (10th Cir. 1999). The *Medlock* court first concluded that CRA 1991 altered only the remedies available if an employer prevails on the same-decision defense.

> Section 107(a) of the Civil Rights Act of 1991, now codified at 42 U.S.C. § 2000e-2(m), overruled the Supreme Court's decision in Price Waterhouse to the extent that that decision holds an employer can avoid a finding of liability by proving it would have taken the same action even absent the unlawful motive. Compare 42 U.S.C. § 2000e-2(m) . . . with Price Waterhouse . . . . Thus, the Civil Rights Act of 1991 does not create the mixed motive standard. Instead, the Act expands the relief available to a plaintiff who demonstrates that an unlawful criterion played a motivating part in an employment decision, even though the

> employer shows that it would have made the same decision regardless. See 42 U.S.C. § 2000e-5(g)(2)(B).

Id. at 552. The court then held that CRA 1991 did not alter the evidentiary requirement necessary to trigger a mixed-motive analysis.

> Furthermore, the Act does not address what type of evidence is required to meet this standard and so warrant a mixed motive instruction. Consequently, we agree with defendant that Price Waterhouse continues to control when a mixed motive instruction is appropriate.

Id. See also Gagnon v. Sprint Corp., 284 F.3d 839, 847-48 (8th Cir. 2002), *cert. denied*, 123 S.Ct. 485 (2002) ("As modified by Section 107 of the Civil Rights Act of 1991 . . . the mixed-motive model allows for declaratory relief, injunctive relief, attorney's fees and costs once Gagnon meets his initial burden regarding direct evidence."); *Tanča v. Nordberg*, 98 F.3d 680, 681 (1st Cir. 1996) ("Congress partially overruled *Price Waterhouse* in the 1991 Act by allowing a finding of liability and limited relief to plaintiffs in mixed motive cases"); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed-motive instruction in accordance with the standards set forth in Section 107, a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires 'direct evidence that decision makers placed substantial negative reliance on an

illegitimate criterion.'", *quoting Price Waterhouse*, 490 U.S. at 227 (O'Connor, J., concurring)).[12]

2. The legislative history confirms that the direct evidence requirement survived the enactment of CRA 1991.

To support its decision to ignore Justice O'Connor's concurring opinion in *Price Waterhouse* and refuse to require direct evidence to trigger a mixed-motive analysis, the Ninth Circuit relies on an erroneous interpretation of CRA 1991's legislative history. The Ninth Circuit argues that the "legislative history evinces a clear intent to overrule *Price Waterhouse*" and that the history shows "beyond doubt" that "the premise for Justice O'Connor's comment is wholly abrogated . . . ." Pet. App. 16a-17a. The legislative history does not support this argument. Rather, the legislative history confirms that the only aspect of *Price Waterhouse* that Congress intended to overrule was the plurality holding that allowed an employer to *avoid liability altogether* by prevailing on the same-decision defense. That result was accomplished by the enactment of Section 107 of CRA 1991. 42 U.S.C. §§ 2000e-2(m) and 5(g)(2)(B).

The House Committee Report accompanying CRA 1991 expressly states that CRA 1991 just "overrules *one*

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[12] In *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996), a panel of the Ninth Circuit stated: "By enacting the 1991 Civil Rights Act, Congress *partially overruled Price Waterhouse*. The Act allows an employer to limit the employee's remedy, rather than defeat liability outright, by showing it would have made the same decision." (Emphasis added.)

aspect of the Supreme Court's decision in *Price Waterhouse*." H.R. Rep. No. 102-40, pt. 1, at 64 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 (emphasis added).[13] The report elaborates: CRA 1991 "would clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate *remedy*." *Id.*

In the section of the report cited by the Ninth Circuit entitled "The Need to Overturn Price Waterhouse," the first paragraph expressly identifies the one aspect of *Price Waterhouse* to be overturned, namely the plurality's conclusion that "*the defendant may avoid a finding of liability*. . . by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Id.* at 46.

Part 2 of the House Committee Report discusses *Price Waterhouse* and states:

> In a 6-3 plurality decision, Justice Brennan, joined by Justices Marshall, Blackmun and Stevens concluded that once a Title VII plaintiff has proven that an unlawful criterion was considered by the employer in making an employment decision, the burden shifts to the employer who can avoid liability "only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken gender into account."

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[13] *See also* H.R. Rep. No. 102-40, pt. 2, at 16-18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (same).

> In separate opinions, Justice O'Connor and Justice White concurred in the decision, concluding that the burden of proof should shift to the employer to show that gender made no difference in the decision, but only when a plaintiff shows "by *direct evidence* that an illegitimate criterion was a substantial factor in the decision."

H.R. Rep. No. 102-40, pt. 2, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (emphasis added). This section of the report shows at a minimum Congressional recognition of the *Price Waterhouse* direct evidence requirement as reflected in the legislative history. As demonstrated above, Congress did not intend to disturb that requirement by enactment of CRA 1991.

In rejecting the argument that a mixed-motive instruction is appropriate in every Title VII case following CRA 1991, the Second Circuit noted that "the House Committee Report makes clear that Section 107 was enacted *solely* to overrule the part of *Price Waterhouse* that allowed an employer to avoid all liability by prevailing on its dual motivation defense." *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997) (emphasis added). *Accord*, *Watson*, 207 F.3d at 218.

The Ninth Circuit's reliance on CRA 1991 and its legislative history to ignore the direct evidence requirement is misplaced. The Ninth Circuit *en banc* dissent correctly concluded that CRA 1991 "did not modify the Supreme Court's prior holding on the need for direct evidence" and that by "vitiating Justice O'Connor's direct evidence

requirement, the majority's holding puts our circuit in conflict with almost all others." Pet. App. 50a-51a.

3. The great weight of circuit court decisions in Title VII discrimination cases continues to apply the direct evidence requirement after CRA 1991.

Congress did not intend to disturb the direct evidence requirement in mixed-motive cases by enactment of CRA 1991. The great weight of circuit court decisions after CRA 1991 continues to require direct evidence to trigger the mixed-motive analysis in discrimination cases brought under Title VII. *See Fernandes*, 199 F.3d at 580 (1st Cir. 1999) ("It follows that plaintiffs may use the *Price Waterhouse* mechanism in disparate treatment cases in which they adduce direct evidence of a discriminatory animus, whereas they must proceed under the conventional *McDonnell Douglas* framework (commonly called 'pretext analysis') in all other cases."); *Fields*, 115 F.3d at 122 (2d Cir. 1997) ("For a plaintiff to be able to insist on a dual motivation charge, there must either be direct evidence of discrimination [citation omitted], or circumstantial evidence that is 'tied directly to the alleged discriminatory animus,' [citation omitted]."); *Watson*, 207 F.3d at 215 (3d Cir. 2000) ("Pursuant to Justice O'Connor's concurrence, only plaintiffs who 'demonstrate []' with 'sufficient direct' evidence that an impermissible factor was a motivating factor are entitled to the shift in the burden of persuasion.", *quoting Price Waterhouse*, 490 U.S. at 275 (O'Connor, J., concurring)); *Wagner v. Dillard Dep't. Stores, Inc.*, 17 Fed. Appx. 141, 148 (4th Cir. 2001) ("In order to merit the more favorable mixed-motive jury instruction, a plaintiff must present 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate

criterion,'" *quoting Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring)); *Sreeram v. Louisiana State Medical Center-Shreveport, et al.*, 188 F.3d 314, 321 (5th Cir. 1999) ("Since we have found that the evidence on the record was insufficient to support an inference of discrimination, it follows that [plaintiff] did not come forward with 'direct evidence' of discrimination so as to trigger evaluation of her claim under [*Price Waterhouse*]."); *Laderach v. U-Haul of Northwestern Ohio, et al.*, 207 F.3d 825, 829 (6th Cir. 2000) ("Once there is credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination."); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997) ("Two methods exist for Plair to satisfy his burden of proof: by direct evidence that racial discrimination motivated Brach's decision to terminate him, or by the indirect, burden-shifting method of [*McDonnell Douglas/Burdine*]."); *Gagnon*, 284 F.3d at 847 (8th Cir. 2002) ("Gagnon can proceed under the mixed-motives standard set forth in [*Price Waterhouse*] if he is able to produce direct evidence that an illegitimate criterion . . . played a motivating part in [the] employment decision.") (Internal quotes and citations omitted.); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1208 n.4 (10th Cir. 1999) ("Generally, a mixed-motives analysis only applies once a plaintiff has established direct evidence of discrimination."); *Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998) (The plaintiff did not present sufficient direct evidence to trigger the *Price Waterhouse* mixed-motive analysis.).[14]

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[14] These circuit courts apply Justice O'Connor's concurring opinion in Title VII discrimination cases after CRA 1991 and require "direct evidence" to trigger the mixed-motive analysis. The circuit courts are not, however, uniform in their interpretation

4. The Ninth Circuit's interpretation of CRA 1991 creates confusion in the law because it requires different evidentiary thresholds to trigger the mixed-motive analysis depending on the type of claim raised.

Justice O'Connor's concurring opinion requiring direct evidence to trigger application of the mixed-motive analysis was rendered in the context of a Title VII sex discrimination case. The direct evidence requirement has been applied consistently to mixed-motive cases raising all types of discrimination and retaliation claims brought under Title VII and other federal and state anti-discrimination laws. *See,* e.g. *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1216 (5th Cir. 1995) (applying the *Price Waterhouse* direct evidence requirement to age discrimination claims brought under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621); *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000) (same); *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 961-62 (11th Cir. 1997) (same as to race discrimination claims brought under 42 U.S.C. § 1981); *Medlock*, 164 F.3d at 550-51 (10th Cir. 1999) (same as to retaliation claims brought under Title VII); *Gagnon*, 284 F.3d at 849-50 (8th Cir. 2002) (same and state law discrimination claims); *Patten v. Wal-Mart Stores East, Inc.*, 300 F.3d 21, 25 (1st Cir. 2002) (same as to disability discrimination claims brought under the Americans with Disabilities Act, 42 U.S.C. §12101-12213); *Buchsbaum v. University Physicians Plan*, 2002 U.S. App. LEXIS 25440, *9-13 (3d Cir. 2002)(same).

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or application of the direct evidence requirement. *See infra*, Argument Section II.B.

Claiming that the law in this area is confusing, the Ninth Circuit felt it "unnecessary" to get "mired in the debate over whether Justice O'Connor's concurring opinion was controlling or not." Pet. App. 16a-18a.[15] The Ninth Circuit cites CRA 1991 and its legislative history to ignore the direct evidence requirement. Instead of lessening the claimed confusion, the Ninth Circuit's decision adds confusion to the law because it requires different evidentiary thresholds to trigger the mixed-motive analysis depending on the type of claim raised. Section 107 of CRA 1991 addresses only Title VII mixed-motive discrimination claims involving "race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(m). Only these five (5) enumerated Title VII claims are affected by Section 107 of CRA 1991, and then only to the extent that an employer who prevails on the same-decision defense no longer avoids liability altogether. No other Title VII claims or other types of discrimination claims brought under other federal anti-discrimination laws are affected by Section 107.[16]

"[I]t is common for employment discrimination complaints to combine claims under different statutes." *Watson*, 207 F.3d at 220. Following the Ninth Circuit's

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[15] The Ninth Circuit characterized other circuit court decisions interpreting and applying the direct evidence requirement as a "quagmire," "this morass," "chaos" and "a veiled excuse to substitute their own judgment for that of a jury." Pet. App. 18a, 21a, 23-24a.

[16] For example, CRA 1991 did not codify the mixed-motive analysis for Title VII retaliation claims brought under 42 U.S.C. § 2000e-3. Neither did CRA 1991 codify the mixed-motive analysis for age discrimination claims brought under the ADEA or for race discrimination claims brought under 42 U.S.C. § 1981.

holding could result in requiring a court to apply a direct evidence standard to trigger mixed-motive treatment of one type of discrimination claim (an ADEA age claim, for example) and a preponderance of the evidence standard to trigger mixed-motive treatment of another type of claim (Title VII sex claim, for example) in the same case. The Third Circuit in *Watson* relied in part on the "confusion" that such a result could cause when it held that the *Price Waterhouse* direct evidence requirement continues to apply to Title VII discrimination claims enumerated in Section 107 after CRA 1991. *Id.* "Compared with the confusion that would result . . . retaining the distinction between the standards of causation in 'pretext' and 'mixed-motive' cases will cause fewer practical problems because cases in which the plaintiff can make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence are relatively uncommon . . . ." *Id.*[17]

By enacting CRA 1991, Congress did not intend to require different evidentiary thresholds to trigger a mixed-motive analysis depending on the type of discrimination claim raised. Rather, Congress intended to overrule only one aspect of the *Price Waterhouse* decision - - the effect of the employer prevailing on the same-decision defense. The Ninth Circuit's reliance on Section 107 of CRA 1991 to declare that direct evidence is no longer required to trigger the mixed-motive analysis in Title VII cases is erroneous. Adoption of that view would serve only to add confusion to the law.

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[17] The situation in which a plaintiff brings a race discrimination claim under both Title VII (a claim covered by Section 107) and 42 U.S.C. § 1981 would require an even more convoluted analysis.

C. There are other compelling reasons to retain the *Price Waterhouse* direct evidence requirement.

The Court should reaffirm that direct evidence is necessary to trigger a mixed-motive analysis (1) to avoid shifting the burden of proof on causation to employers in most discrimination cases, and (2) to maintain the balance between employee and employer rights in discrimination cases.

1. Failure to retain the *Price Waterhouse* direct evidence requirement would shift the burden of proof on causation to the employer in most discrimination cases.

The *Price Waterhouse* plurality opinion and both concurring opinions took great pains to express the view that the mixed-motive framework that applied in that case did not overrule or require modification of the Court's holdings in *McDonnell Douglas* or *Burdine*. "Our holding casts no shadow on Burdine . . . ." *Price Waterhouse*, 490 U.S. at 245 (Brennan, J., plurality opinion). "I agree with Justice Brennan that applying this approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in [*Burdine* and *McDonnell Douglas*]." *Id.* at 260 (White, J., concurring). "The evidentiary rule the court adopts today should be viewed as a supplement to the careful framework established by our unanimous decisions in [*McDonnell Douglas* and *Burdine*]." *Id.* at 261 (O'Connor, J., concurring).[18] In a unanimous

[18] The *Price Waterhouse* dissenting opinion would not shift the burden of proof on causation to employers in mixed-motive cases and stated that "adherence to the evidentiary scheme established in

opinion, the Court recently reaffirmed the application of the *McDonnell Douglas/Burdine* framework in cases based on circumstantial evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141-43 (2000).

The Ninth Circuit not only ignores the Court's *Price Waterhouse* holding, but by failing to require direct evidence it effectively circumvents the *McDonnell Douglas/Burdine* analysis. Without the *Price Waterhouse* evidentiary restraint on when plaintiffs may invoke the mixed-motive analysis, almost every plaintiff will opt for that analysis in order to shift the burden of proof on causation to the employer. As the *Price Waterhouse* dissenting opinion noted: "[A]lmost every plaintiff is certain to ask for a *Price Waterhouse* instruction, perhaps on the basis of 'stray remarks' or other evidence of discriminatory animus." *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting). This is so because "plaintiffs enjoy more favorable standards of liability in mixed-motive cases. . . ." *Fuller*, 67 F.3d at 1141.

Under the Ninth Circuit's view, any circumstantial evidence of discrimination would be sufficient to shift the burden of proof on causation to the employer in mixed-motive cases. Pet. App. 29a-33a. The Ninth Circuit would apparently shift the burden of proof to the employer where the plaintiff makes out only a *prima facie* case of discrimination and introduces circumstantial evidence that the employer's explanation for its actions are unworthy of credence. Pet. App. 31a. Such a showing is no more than a *McDonnell Douglas/Burdine* circumstantial evidence case, as reaffirmed by the Court in *Reeves*. The Ninth Circuit acknowledges that: "In many respects, Costa's case presents a typical Title VII

[*McDonnell Douglas/Burdine*] is a wiser course . . . ." *Id.* at 279 (Kennedy J., dissenting).

case in which a plaintiff alleges that she was discharged or disciplined for a discriminatory reason and the employer counters that the reason for its action was entirely different." Pet. App. 34a. Caesars suggests that this is the scenario in virtually all Title VII discharge and disciplinary cases in which plaintiffs rely on circumstantial evidence of discrimination. The Ninth Circuit impermissibly shifted the burden of proof on causation to Caesars.

Adopting the Ninth Circuit's view and ignoring the *Price Waterhouse* direct evidence requirement would result in an impermissible shift of the burden of proof on causation to the employer in virtually all Title VII cases. Such a result is contrary to over 25 years of jurisprudence under Title VII since *McDonnell Douglas*. Other courts have recognized this danger. *Fernandes*, 199 F.3d at 580 ("It is readily apparent that this mixed-motive approach, uncabined, has the potential to swallow whole the traditional *McDonnell Douglas* analysis."); *Fuller*, 67 F.3d at 1142 ("' not all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge.' [Citation omitted.] Otherwise, any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish between the two theories."); *Watson*, 207 F.3d at 215 ("As Justice O'Connor made clear in her concurrence, the *Price Waterhouse* shift in the burden of persuasion does not apply to 'pretext' cases, in which plaintiffs prove intentional discrimination indirectly through the burden-shifting paradigm set forth in *McDonnell Douglas* and its progeny."); *Hook v. Ernst & Young*, 28 F.3d 366, 376 (3d Cir. 1994) ("The Supreme Court has taken great pains to differentiate between the two theories. . . . Therefore, to the extent [plaintiff] argues that production of evidence sufficient to show a *McDonnell Douglas/Burdine* prima facie

case is evidence of discrimination sufficient to warrant a mixed-motives instruction, we think she misstates the law."); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-49 (8th Cir. 1993) ("it is clear that merely establishing a *prima facie* case of discrimination is not enough" to entitle "a plaintiff to a *Price Waterhouse* burden-shifting instruction.").

The Court should reaffirm that direct evidence is required to trigger application of the mixed-motive analysis and shift the burden of proof on causation to the employer. To do otherwise will destroy the careful *McDonnell Douglas/Burdine* framework established by the Court.

2. Failure to retain the *Price Waterhouse* direct evidence requirement would upset the balance struck between employee and employer rights in Title VII cases.

The Court should reject the invitation to allow the plaintiff-friendly mixed-motive analysis to override the *McDonnell Douglas/Burdine* framework. By any measure, cases filed in federal court alleging employment discrimination continue to rise.[19] The "strong medicine of requiring the employer to bear the burden of persuasion on the

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[19] In 2001, there were 21,157 employment discrimination cases on the dockets of United States District Courts. Leonidas, Ralph Mecham, 2001 *Annual Report of the Director for the Judicial Business of the United States Court*, at Table C-2A, at http. // www.uscourts.gov / judbususc / judbus.html. Only general habeas corpus petitions comprised a larger portion of the courts' civil dockets - 24,684 cases. *Id.*

issue of causation"[20] in employment cases should not be dispensed lightly. Retaining the direct evidence requirement avoids an incentive for employers to adopt quotas and engage in preferential treatment of protected groups in violation of Title VII. The Court recognized in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (O'Connor, J., plurality opinion) that: "If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted."

By adopting the direct evidence requirement, Justice O'Connor's concurring opinion balanced the rights of employees and employers under Title VII, requiring plaintiffs to carry a high evidentiary burden to trigger a mixed-motive analysis. Justice O'Connor's concurrence also warned of the dangers described in *Watson* by stating:

> Shifting the burden of persuasion to the employer in a situation like this one [where direct evidence is produced] creates no incentive to preferential treatment in violation of [Title VII]. To avoid bearing the burden of justifying its decision, the employer need not seek racial or sexual balance in its work force; rather, all it need do is avoid substantial reliance on forbidden criteria in making its employment decisions.

Price Waterhouse, 490 U.S. at 275 (O'Connor, J., concurring).

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[20] *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring).

Enactment of CRA 1991 reinforces this rationale for retaining the direct evidence requirement in mixed-motive cases. When Justice O'Connor's concurring opinion balanced the rights of Title VII litigants and adopted the direct evidence requirement, the employer could avoid a finding of liability altogether by prevailing on the same-decision defense. After CRA 1991, the employer no longer avoids a liability finding but rather can only limit its damages. CRA 1991 shifts the balance in favor of Title VII plaintiffs on the remedy issue. Retention of the direct evidence requirement is necessary after CRA 1991 to maintain the balance of rights struck by the *Price Waterhouse* holding.

II. The Evidence Required to Trigger the Burden-Shifting Framework of *Price Waterhouse* Must Meet a High Standard.

A. *Price Waterhouse* implicitly and explicitly set a high standard for the required evidence.

1. Before *Price Waterhouse*, the Court had rejected shifting the burden of proof on causation in disparate treatment cases under Title VII; thus, approving a burden-shifting framework in *Price Waterhouse* implicitly recognized its extraordinary circumstances.

Before *Price Waterhouse*, the Court had rejected shifting the burden of proof on causation to the employer in disparate treatment employment discrimination cases. In

Board of Trs. of Keene State Coll. et. at. v. Sweeney, 439 U.S. 24 (1978), the First Circuit had interpreted *McDonnell Douglas* as requiring the employer to prove the absence of discriminatory motive on the theory that the employer had greater access to such evidence. *Id.* at 24. The Court rejected this interpretation, explicitly holding that the employer does not carry the burden of persuasion; it only must "articulate" but not "prove" a legitimate, nondiscriminatory reason for its decision. *Id.* at 24-25. "The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." *Id.* at 27 (Stevens, J., dissenting). *See also* Argument Section I.A.

2. The record facts in *Price Waterhouse* provided extraordinary circumstances that supported a burden-shifting framework and, by implication, established a high threshold for doing so.

The facts in *Price Waterhouse* supporting plaintiff's claim of unlawful disparate treatment were compelling. As a candidate for partnership in her firm, plaintiff had compiled a record of accomplishment, particularly in business development, matched by none of the other 87 candidates. *Price Waterhouse,* 490 U.S. at 234 (Brennan, J., plurality opinion). Her only shortcoming, in the view of the partners deciding her candidacy, was her aggressiveness, which was seen as "spill[ing] over into abrasiveness." *Id.* at 234. It was clear on the record that at least some of the partners reacted negatively to plaintiff "because she was a woman." *Id.* at 235. Several partners described their view of plaintiff's over-aggressiveness in gender-based terms: "macho," "overcompensat[ing] for being a woman," and "has matured

from a tough-talking somewhat masculine hard-nosed mgr to an authorative, formidable, but much more appealing lady ptr candidate." *Id.* at 235. Perhaps most revealing of the decisionmakers' thought processes, the partner charged with explaining to plaintiff why the firm had decided to place her candidacy on hold stated that plaintiff should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* Justice O'Connor's concurring opinion summarized the evidence as follows:

> In this case, the District Court found that a number of the evaluations of Ann Hopkins submitted by partners in the firm overtly referred to her failure to conform to certain gender stereotypes as a factor militating against her election to the partnership. . . [T]hese evaluations were given "great weight" by the decisionmakers at Price Waterhouse.

Id. at 272 (O'Connor, J., concurring). Highlighting how plaintiff had produced the strongest possible evidence of discriminatory animus - evidence linked directly to the challenged employment decision - Justice O'Connor's concurring opinion explained:

> It is as if Ann Hopkins were sitting in the hall outside the room where partnership decisions were being made. As the partners filed in to consider her candidacy, she heard several of them make sexist remarks in discussing her suitability for partnership. As the decisionmakers exited the room, she was *told* by one of those privy to the decisionmaking

process that her gender was a major reason for the rejection of her partnership bid.

Id. at 272-73.

Given such (i) direct evidence of illegal motive, (ii) by the decisionmakers, (iii) at the moment of their decision, no wonder the plurality opinion held that the employer could "avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's gender into account." *Id.* at 258 (Brennan, J., plurality opinion).

Justice O'Connor's concurring opinion agreed with this burden-shifting approach in the context of such strong, direct evidence of discrimination in part because: "[T]he explicit consideration of race, color, religion, sex, or national origin in making employment decisions 'was the most obvious evil Congress had in mind when it enacted Title VII.'" *Id.* at 275 (O'Connor, J., concurring), *quoting Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977).

3. Justice O'Connor's concurring opinion explicitly set a high standard for burden-shifting; only direct evidence that an illegitimate criterion was a substantial factor in the challenged decision suffices; comments by non-decisionmakers, unrelated comments by decisionmakers, and stray remarks are insufficient.

Recognizing that an employer's burden of rebuttal under the *McDonnell Douglas/Burdine* framework is

intentionally light (i.e., mere articulation of a legitimate reason) because plaintiff's prima facie burden is light (i.e., raising an inference of possible discrimination), Justice O'Connor's concurring opinion stated:

> In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.
>
> * * *
>
> Thus, stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. . . . What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.

Id. at 276-77 (O'Connor, J., concurring).[21]

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[21] Though the *Price Waterhouse* plurality opinion did not describe precisely what evidence would suffice to shift the burden of persuasion on causation to the employer, the plurality opinion stated that its description of what would be required is *not* "meaningfully different" than this description in Justice O'Connor's concurring opinion. *Id.* at 250 n.13. (Brennan, J., concurring opinion.)

B. Most circuit courts have defined "direct evidence" strictly as a prerequisite to burden-shifting.

The most exhaustive work by any court to catalogue the circuits' varied approaches to the direct evidence question is reported in *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572 (1st Cir. 1999).

In *Fernandes*, plaintiffs and all other "dark-skinned Cape Verdean" workers were denied rehire when their suspended construction project resumed. *Id.* at 578. Plaintiffs sued alleging race, national origin and color discrimination. *Id.* at 579. In addition to showing that only white and light-skinned Portuguese workers, but no dark-skinned Cape Verdean workers, were rehired, plaintiffs introduced evidence that in refusing to rehire them the employer had stated: "I don't need minorities, I don't need no residents on this job," and "I don't have to hire you locals or Cape Verdean people." *Id.* at 578. The employer asserted legitimate, nondiscriminatory reasons for its decisions. *Id.* at 586. The district court entered summary judgment against all of plaintiffs' claims, concluding that the employer's statements were "stray remarks," insufficient to trigger a mixed-motive analysis, and that under a pretext analysis, the employer's articulated, nondiscriminatory reasons were not proven to be pretextual. *Id.* at 587.

On appeal, the First Circuit began by asking whether the employer's statements constituted "direct evidence" within the meaning of *Price Waterhouse*. Before deciding, the court surveyed the law in all circuits on the point and placed it in three rough categories: the "classic" position ("holding that ['direct evidence'] signifies evidence that, if believed, suffices to prove the fact of discriminatory animus without inference,

presumption, or resort to other evidence"); the "animus plus" position (requiring "evidence, both direct and circumstantial, of conduct or statements that (a) reflect directly the alleged discriminatory animus and (b) bear squarely on the contested employment decision"); and the "animus" position (accepting as sufficient, direct or circumstantial evidence proving the alleged discriminatory animus, whether or not it bears squarely on the challenged employment decision). *Id.* at 581. Ultimately, the court concluded that the employer's statements in *Fernandes*, while not dismissible as mere "stray remarks," were at best "ambiguous statements" that would not rise to the level of "direct evidence" under any of the three approaches. *Id.* at 583. Therefore, it agreed with the district court that the mixed-motive framework was not triggered and remanded for further proceedings. *Id.* at 583-589.

The *Fernandes* 1999 survey of the circuits is still useful: it not only displays the degree to which circuit courts are divided on defining "direct evidence" but also the degree to which their varied approaches have unified around two fundamental principles. The courts that *Fernandes* catalogued as taking the "classic" or "animus-plus" approach agree that: (1) the proffered evidence must demonstrate the alleged discriminatory animus, and (2) it must bear squarely on the contested employment decision. (The difference between the approaches is that the former would not recognize *circumstantial* evidence.) Representative decisions requiring both (1) and (2) as elements of the definition of "direct evidence" include: *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57, 60 (1st Cir. 2000); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 (3d Cir. 2002); *Wagner*, 17 Fed. Appx. at 148 (4th Cir. 2001); *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897-98 (5th Cir. 2002), *petition for cert. filed*, (Jan. 27, 2003); *Laderach*, 207 F.3d at 829 (6th Cir. 2000); *Markel v. Board of Regents*, 276 F.3d 906, 910 (7th Cir. 2002); *Equal*

Employment Opportunity Comm'n. v. Liberal R-II Sch. Dist., 314 F.3d 920, *8-10 (8th Cir. 2002); *Shorter*, 188 F.3d at 1207-08 (10th Cir. 1999); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330-31 (11th Cir. 1998).

Only the Second Circuit has consistently taken the position that no link between animus and the challenged decision is required. *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 161-62 (2d Cir. 2001). The Eighth Circuit has vacillated. *Compare Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 448-49 (8th Cir. 1993) and *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999) with *Equal Employment Opportunity Comm'n. v. Liberal R-II Sch. Dist.*, 314 F.3d 920 (8th Cir. 2002).

The great majority of courts, then, understand *Price Waterhouse* not only to require "direct evidence" to trigger the mixed-motive/burden-shifting analysis, but also to set a strict standard for its satisfaction.

C. The best approach is the one applied by the First Circuit in *Febres v. Challenger Caribbean Corp.*

The First Circuit has devoted special time and attention to studying this issue, and it has adopted the correct approach. Less than one year after the *Fernandes* study, the First Circuit returned to the question in *Febres v. Challenger Caribbean Corp.*, 214 F.3d 57 (1st Cir. 2000).

In *Febres*, the employer downsized, retaining some employees and terminating others. *Id.* at 59. Three officials were responsible for deciding whom to keep and whom to let go. *Id.* During their deliberations, one said privately to

another that three factors were to be used in the process: job performance, union identification, and "in some cases, the age." *Id.* Plaintiffs, none of whom was retained, sued for age discrimination. *Id.* Plaintiffs asserted that the quoted language constituted direct evidence of intentional age discrimination. *Id.* at 60. The employer argued that this was not direct evidence within the meaning of *Price Waterhouse* because the statement "may have been referring to a plan to give older employees special (favorable) treatment." *Id.* at 61. The court of appeals rejected that argument, in part because the official who testified about hearing the comment explained that, in response, he had "defended the older people" and pointed out that "us older guys sometimes work better than younger people." *Id.* at 61 n.4. The First Circuit held that plaintiffs had established direct evidence sufficient to trigger application of the mixed-motive analysis. *Id.* at 62.

Of more interest than the outcome in *Febres* is the court's approach to the direct evidence question. Rather than draw "fine distinctions," the court held that evidence is "direct" and thus justifies a mixed-motive jury instruction:

> when it consists of [1] statements by a decisionmaker [2] that directly reflect the alleged animus and [3] bear squarely on the contested employment decision.[22]

---

[22] The court found the quoted statement to bear squarely on the contested employment decision, which was whom to retain. It rejected the employer's argument that the words did not bear squarely on the narrower question of whether to retain precisely the plaintiffs. *Id.* at 62.

Id. at 60 (bracketed numbers added). Stated differently:

> In a mixed-motive case, the burden of persuasion does not shift merely because the plaintiff introduces sufficient direct evidence to permit a finding that a discriminatory motive was at work; the burden shifts only if the direct evidence in fact persuades the jury that a discriminatory motive was at work. Put another way, the burden of persuasion does not shift unless and until the jury accepts the "direct evidence" adduced by the plaintiff and draws the inference that the employer used an impermissible criterion in reaching the disputed employment decision.

Id. at 64.

The *Febres* approach best unifies the plurality opinion and Justice O'Connor's concurring opinion in *Price Waterhouse* as well as the stronger principles of the various circuit positions.[23] It also has these virtues: (1) it preserves the mixed-motive framework as a real alternative for plaintiffs who can prove "the most obvious evil Congress had in mind . . . .," i.e., "explicit consideration" of race, color, religion, sex, or national origin as a motivating factor in employment

---

[23] *See* Elissa R. Hoffman, Note, *Smoking Guns, Stray Remarks, and Not Much in Between: A Critical Analysis of the Federal Circuits' Inconsistent Application of the Direct Evidence Requirement in Mixed-Motive Employment Discrimination Cases*, 7 Suffolk J. Trial & App. Advoc. 181 (2002).

decisions;[24] (2) it does not reject circumstantial evidence automatically, so long as it proves statements by the decisionmaker(s) that directly reflect the alleged animus and that bear squarely on the contested employment decision; and (3) it limits the circumstances in which employers will face strict liability for attorney's fees and injunctive relief to those "relatively rare" situations where direct evidence of discrimination has been provided.

D. Only a strict definition of "direct evidence" will shield defendants from the inherent prejudice caused by jury instructions like the pattern instruction given below.

The present case provides an excellent example of the risk of prejudice to employers when mixed-motive jury instructions are given in the absence of direct evidence of discrimination.

At the close of evidence, Caesars was confident plaintiff had not proven by direct evidence that gender played any part in any adverse employment decision. Therefore, Caesars argued that the mixed-motive framework was inapplicable; the proper framework was the pretext framework of *McDonnell Douglas/Burdine*. Under that framework, Caesars' burden was to articulate a legitimate, nondiscriminatory reason. Caesars had carried its burden by showing that plaintiff was terminated over an altercation with a co-worker against a background of prior warnings and suspensions for failing to get along with others. Costa's burden throughout was to prove that gender was the but-for

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[24] *Price Waterhouse*, 490 U.S. at 274 (O'Connor, J., concurring), *quoting Teamsters*, 431 U.S. at 335 n.15.

reason for termination, and one of the ways she might do that was to show that Caesars' reason was pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508-13 (1993).

Over Caesars' objection, the trial court gave the following pattern jury instruction:

> *You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex* and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> . . .

Pet. App. 33a-34a (emphasis added). The first question on the verdict form was:

> Do you find that Defendant Caesars Palace violated the Civil Rights Act *in that Plaintiff's gender (sex) was a motivating factor* in any adverse condition of plaintiff's employment?

J.A. 40 (emphasis added). The prejudice to Caesars is clear. A reasonable lay juror would almost unavoidably conclude that the trial judge was directing a verdict in plaintiff's favor on the question of gender as a motivating factor.[25]

---

[25] The dissenting opinion in *Price Waterhouse* predicted: "Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under 42 U.S.C. Section 1981 or the [ADEA], where courts borrow the Title VII order of proof for the conduct of jury trials." *Price Waterhouse*, 490 U.S. at 292

The problem was not so much with the words of the instruction or of the verdict form. The problem was with the low (or *nonexistent*) evidentiary threshold found to trigger the mixed-motive framework in the first place. Mere "evidence that" unlawful reasons motivated a decision, without more, can never be sufficient. If the trial court below had followed *Price Waterhouse* it would not have applied the mixed-motive framework.

1. The overtime comment is not direct evidence.

The second *Febres* factor requires "direct evidence" to reflect directly the alleged animus. Costa's evidence regarding the overtime assignment does not satisfy the requirement. She testified that the supervisor said her co-worker had a family to support. Costa admitted that the supervisor made *no* reference to the co-worker's gender or to hers. J.A. 8-9 [Costa Tr. 248-49]. The language used was gender neutral because a person of either gender could have dependent family members to support. The supervisor's statement fails to show that the co-worker received overtime because he was a man, or that Costa was denied overtime because she was a woman. The co-worker had a family to support while Costa did not. J.A. 9 [Costa Tr. 249].

Comments that are isolated and ambiguous do not constitute direct evidence of sex discrimination. *Komac v. Gordon Food Serv.*, 3 F. Supp. 2d 850, 855 (N.D. Ohio 1998) (when plaintiff protested that men earned more money, her supervisor responded that they "have a wife and three kids

---

(Kennedy, J., dissenting). CRA 1991, making jury trials the norm for all Title VII cases, has magnified the problem the dissenting opinion predicted.

at home" – held not direct evidence of sex discrimination because it was isolated and ambiguous in light of the context). Here, there is *no* evidence that the supervisor made any other statements about family issues. The one statement that was made was ambiguous and gender neutral because it could have referred to any employee denied overtime because others had families to support. Moreover, the statement cannot support a discriminatory discharge claim because it fails to satisfy the third *Febres* factor: it bears no relation to Costa's termination. Stewart Tr. 480: 15-25, 481: 1-3. The supervisor who made the statement (Bach) was not involved in the termination decision. *Id.*

2. Karen Hallett's use of the word "bitch" is not direct evidence.

Costa's co-worker testified that Karen Hallett told him that she wanted to get rid of "that bitch," referring to Costa. J.A. 11-12 [Graham Tr. 298-99]. This evidence also falls far short of the second *Febres* factor. Many courts have found that the mere use of the word "bitch" is not evidence of gender animus. *Neuren v. Adduci, Mastriani, Meeks and Schill, et. al.*, 43 F.3d 1507, 1513 (D.C. Cir. 1995) (reference to plaintiff as "bitch" in written performance evaluation was grounded in gender-neutral concerns about plaintiff's interpersonal relations with co-workers rather than discriminatory considerations); *Barnett v. Depart. of Veterans Affairs*, 153 F.3d 338, 342-43 (6th Cir. 1998) (use of the word "bitch" by supervisor who made it known that he disliked plaintiff and used her as the butt of office jokes is consistent with personal dislike rather than discriminatory animus); *Kriss v. Sprint Communications Co. Ltd. P'ship.*, 58 F.3d 1276, 1281 (8th Cir. 1995) (use of the word "bitch" is not an indication of general misogynist attitude where the term was directed toward only one woman, rather than women in

general and was, therefore, not particularly probative of gender discrimination).

Here, the context of Hallett's statement gives no support to a finding of gender animus. Where words such as "bitch" can have several connotations, context is everything in interpreting them. *Galloway v. General Motors Serv. Parts Operations*, 78 F.3d. 1164, 1168 (7th Cir. 1996), *overruled in part by AMTRAK v. Morgan*, 536 U.S. 1001 (2002). The *Galloway* court explained the importance of context in analyzing use of the word "bitch":

> It is true that "bitch" is rarely used of heterosexual males (though some heterosexual male teenagers have taken recently to calling each other "bitch"). But it does not necessarily connote some specific female characteristic, whether true, false, or stereotypical; it does not draw attention to the woman's sexual or maternal characteristics or to other respects in which women might be thought to be inferior to men in the workplace, or unworthy of equal dignity and respect. In its normal usage, it is simply a pejorative term for "woman." If Bullock had called Galloway a "sick woman," and a similarly situated male coworker a "sick man," there would be no ground for an inference of sex discrimination. And, likewise, were there a similarly situated male worker to Galloway whom Bullock called a "sick bastard" while calling her a "sick bitch," we do not think it would be rational for a trier of fact to infer that Bullock was making the workplace more uncongenial for women than for men. Even if Bullock didn't abuse

> any men, there would not be an automatic inference from his use of the word "bitch" that his abuse of a woman was motivated by her gender rather than by a personal dislike unrelated to gender.

Galloway, 78 F.3d at 1168.

The co-worker to whom Karen Hallett allegedly made the statement was asked whether Hallett gave any reason why she wanted to get rid of Costa. The co-worker responded: "No, it was basically she did not like the way that Catharina did her job." Graham Tr. 299: 3-5. The context lends no credence whatsoever to an argument that Hallett's use of the word "bitch" was evidence of gender animus.

Other testimony by three co-workers confirms that the conflict between Costa and Hallett was personal and that there was no gender animus. One confirmed that they "didn't like each other," and he did not consider their animosity to be based on "sex or someone being a female versus a male." Thomas Tr. 323: 17-25, 324: 1-8. Another testified that Hallett's management style created problems for the entire department, and that "males as well as females" had filed over 52 union grievances while Hallett was in management that remained unresolved. Graham Tr. 307: 5-25, 308: 1. The third elaborated on the animosity between manager Hallett and union steward Costa, noting that Costa was "very vocal about union contract issues" during a contentious time between labor and management. Bell Tr. 340: 10-23.

Hallett's use of the term "bitch" in reference to Costa does not constitute evidence or gender animus sufficient to satisfy the second *Febres* factor. Neither does this evidence satisfy the third *Febres* factor. There is no evidence in the

record to indicate that the use of this term was related to the termination decision. On the contrary, as discussed above, the disputes between Hallett and Costa and between Hallett and other workers were ongoing events with no nexus to Costa's termination.

Neither the overtime assignment nor the use of the term "bitch" constitutes direct evidence under *Febres* or within the meaning of *Price Waterhouse*, and Costa was therefore not entitled to a mixed-motive instruction. Without the erroneous ruling that this case met the *Price Waterhouse* requirement for mixed-motive analysis, the trial court would not have used the pattern instructions for mixed-motive cases. It would have proceeded, as Caesars' requested, under the *McDonnell Douglas/Burdine* pretext framework.

CONCLUSION

For these reasons, Caesars respectfully requests that the Ninth Circuit *en banc* opinion be reversed and that the Court reinstate the Ninth Circuit panel opinion.

Respectfully submitted.

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APPENDIX A

Quoted below are pertinent sections of Title VII of the Civil Rights Act of 1964 (as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166), 29 U.S.C. § 2000e *et. seq.*

42 U.S.C. § 2000e-2(a)(1) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B) provides:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action

in the absence of the impermissible motivating factor, the court —

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney' s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

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Supreme Court, U.S.
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MAR 31 2003
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No. 02-679

In The
Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT OF THE FACTS

In February, 1987, respondent Catharina F. Costa was hired by Caesars Palace as the first and then only female warehouseman.[1] Costa was a member of the International Brotherhood of Teamsters. Her job duties included operating forklifts and pallet jacks. Until Costa was hired, warehouseman had been an all male job; women held only clerical positions in the warehouse. In the years leading to her dismissal in 1993, Costa was subject to an ongoing barrage of discriminatory practices.

Harassment and Verbal Abuse

In August, 1991, a male coworker called Costa a "fucking cunt", and she responded with a gender-neutral epithet. Costa complained to her supervisor. Although the male worker admitted in writing that he had used that graphic language, Caesars did not disclose that admission to Costa. Instead, the employer responded by punishing Costa as well as the abuser.

In October, 1992, Costa was the only woman with a group of male coworkers who were eating during a non-scheduled break. A male supervisor approached Costa and demanded, "Don't you have work to do?", then walked away without saying anything to the men who were also on break. Costa complained in vain about this remark to Caesars' Labor Relations Manager.[2]

---

[1] This is the job title in the collective bargaining agreement between Caesars and the Teamsters. PX 77, article 15.01. Costa referred to herself as a warehouse person.

[2] Tr. 44-45, 301-02, 312, 331.

In another incident, a male supervisor ordered Costa, against her will, to sign a United Way card. None of the men were ordered to do so. Costa complained without success to company officials, who told her there was nothing they could do about it.[3]

The Receiving Office at Caesars was officially off-limits to all employees. Despite that rule, male workers were permitted to take their breaks in that office, eating and reading newspapers. Costa was not allowed in the Receiving Office; when she attempted to go there with male coworkers, she was the only one thrown out by supervisors. Costa complained without effect about this discriminatory practice.[4]

In 1993, a then newly hired assistant manager in the warehouse, Karen Hallett,[5] at times stalked Costa at work, warning that she "was going to be on [Costa's] every move." Hallett would follow Costa into the freezer or produce box, and was repeatedly observed peeking around corners and food pallets to watch Costa. Costa, accompanied by two male coworkers, complained in vain to the Labor Relations Manager about this. The Manager responded, flippantly, "Well, she's stalking you, why don't you go file a police report."[6]

Discriminatory Discipline

On September 9, 1991, Costa was disciplined for clocking in at 6:01 A.M. when her work time was 6:00 A.M.

[3] PX 37, Tr. 57-59, 71-73, 313-14, 597.

[4] Tr. 210-12, 300-01, 312.

[5] Hallett was hired by Caesars in July 1993, some six years after Costa. Tr. 508.

[6] Tr. 145-49, 177-78, 288-300, 304-06, 343-44, 537-39.

The discipline was for not being at her work place at 6:00 A.M. The same time sheets contained records of a male worker who had not clocked in at all for two days in a row, but had received no discipline.

On December 12, 1991, Costa was disciplined for having telephoned that she would be late for work. Male coworkers were not given warnings for calling in late, but instead, were given overtime to make up the work time they missed. But Costa was not granted overtime to make up her lost time as the men were.[7]

On April 5, 1992, Costa was disciplined for tardiness as a result of arriving at her place of work late. The same time sheets revealed that several of her male coworkers were leaving their stations early but had not been disciplined.

On May 4, 1992, Costa was suspended by her supervisor for missing work even though she had been given medical leave by the company's Vice President of Human Resources. In spite of the leave of absence, Costa was forced to file a formal grievance to have the suspension voided.[8]

On September 15, 1992, a worker who came to the warehouse for supplies was abusive to Costa. Rather than argue, Costa went to her male supervisor and asked him to intercede. The supervisor instead chastised Costa for being rude to the other worker, and when Costa complained about that response, the supervisor further disciplined her for voicing that objection.

[7] Tr. 73-78, PX 11, PX 16.

[8] Tr. 86-89, PX 12.

In October, 1992, the same male supervisor suspended Costa for assertedly recklessly endangering a fellow employee with an electric cart. A subsequent investigation revealed that that supervisor had lied in his report. That information was withheld from Costa for several years.[9]

Costa, also in 1992, was disciplined for alleged unsafe use of a forklift, despite the fact that the men who had been driving the forklift in a similar manner were not sanctioned. When the men ran into walls with the forklift, or in one instance hit someone's car, no discipline was meted out.[10]

In the summer of 1992, Costa was suspended for 30 days for allegedly making a vulgar ethnic remark. No male had ever been suspended for 30 days for vulgar language or ethnic slurs, even though they were commonplace in the warehouse. A Teamster's official testified that he had never seen a 30-day suspension for anything at Caesars. The 30-day suspension was grieved, went to arbitration, and was overturned by the arbitrator.[11]

On August 31, 1993, Costa was disciplined for having been tardy on nine occasions in 1993. Costa filed a grievance because she had been under a doctor's care, and her supervisor had refused to consider notes from Costa's doctor. During the same period, a male worker who had missed several entire days of work and had no doctor's note at all was not disciplined. Instead he was permitted to work overtime to make up his absences. When Costa objected to this difference in treatment, she was told "he's a man and has a family to support." In addition, a male

[9] Tr. 48-51, 53, PX 51.

[10] Tr. 315-317.

[11] Tr. 40-41, 111-113, 170-171, 172, 199, 371, PX 39-41, 44-46, PX 49.

coworker testified that when he received an absentee warning, the supervisor who had issued it explained, " . . . she had to give it to me because she was beating Catharina to death with it, you know, she was giving Catharina a lot of warnings so she had to give me one."[12]

Discriminatory Denial of Overtime

Overtime, because of the higher hourly pay, was highly regarded by the workers. Costa asked her supervisors repeatedly for overtime, but was almost always passed over in favor of her male coworkers. As early as April 12, 1991, Costa was forced to file a formal grievance in an attempt to get overtime. A 1992 summary of overtime showed that of the 95.5 hours of overtime allotted, eight men received the majority of overtime hours, while Costa had received only 2 hours.[13] On September 24, 1993, Costa again filed a formal grievance stating that she had unfairly been denied overtime.

On March 24, 1994, Costa's supervisor submitted a memorandum to the Labor Relations Manager, setting forth a list of people who had refused overtime since October 1, 1993. Costa was listed as having refused overtime on March 17, 1994, despite the fact that Costa was out of the country on that date and could not have refused.[14]

Costa's supervisors subsequently changed their tactics. They began offering her overtime work only a few minutes before she was scheduled to go home. They would

[12] Tr. 79-85, 91-95, PX 14, PX 15, PX 16.

[13] Tr. 95-96, PX 17, Tr. 63

[14] Tr. 100-103, PX 22, PX 18.

ask the men early in the morning, so the male workers could make any necessary arrangements. Costa, again, filed a formal grievance, and Caesars agreed to end this practice. Even after grievance, however, this problem continued.[15]

Costa's Dismissal

On May 24, 1994, Costa filed a complaint alleging sexual harassment and discrimination with the Nevada Equal Rights Commission and the Federal Equal Employment Opportunity Commission. She was dismissed on August 15, 1994, only three months later.

Caesars found an excuse for dismissing Costa when she was physically attacked by a male coworker in an elevator. Herb Gerber went looking for Costa to accuse her of reporting his unauthorized lunch breaks to management. Gerber entered the warehouse elevator behind Costa and trapped her in the elevator. Costa was frightened by Gerber's anger and pleaded with him "don't hit me." Gerber slammed Costa against the wall of the elevator, badly bruising her upper arm. Costa's version of the incident was corroborated by pictures of her bruised arm and by a witness who saw Gerber blocking the elevator door. After promptly reporting the attack to her supervisor, Costa returned to work, only to have Gerber seek her out and "come at" her a second time. (Pet. App. 61).

Caesars responded to the attack by firing Costa and suspending Gerber for only five days. Gerber gave conflicting accounts of what had occurred, at first denying that there had been any physical contact, then asserting that Costa had shoved (or perhaps hit) him, possibly first,

[15] Tr. 106-109, PX 23.

ultimately admitting she had done neither.[16] The suggestion that Costa might have started a physical fight with Gerber was belied by the fact, obvious to Caesars and the jury alike, that Costa, a woman of average height and weight, would obviously have been no match for the taller, heavy set Gerber.

Caesars did not conclude that Costa had started the altercation. Rather, the official responsible for the disciplinary decisions explained that he decided to punish both Costa and Gerber because he could not figure out whose account to believe.[17] Caesars claimed it had imposed the far more modest penalty on Gerber because he had not been disciplined before; to the contrary, Gerber had, in fact, been the subject of prior disciplinary action.

SUMMARY OF ARGUMENT

This case involves an unremarkable application of section 703(m) of Title VII. That provision states that an unlawful employment practice is established if the plaintiff "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice." Section 703(m) is not limited to cases involving, and does not require proof of the existence of, multiple motives. Instruction No. 9, to which Caesars has never objected, accurately paraphrased section 703(m).

Instruction No. 10, to which Caesars does object, merely sets forth the partial affirmative defense established by section 706(g)(2)(B). The jury found that Caesars acted with both a discriminatory and another (unidentified) motive in dismissing Costa, but concluded that

[16] Tr. 581.

[17] Tr. 489-91.

Caesars would not have dismissed Costa if she had been a man.

Petitioner appears to contend that a jury cannot be instructed under sections 703(m) and 706(g)(2)(B) unless the plaintiff has adduced "direct evidence" of discrimination. But nothing in the language of Title VII permits the imposition of such a limitation. Section 703(m) requires only that a plaintiff "demonstrat[e]" the existence of an impermissible motive. Section 701(m) specifically defines demonstrate to mean only that a party must meet both the burden of production and the burden of persuasion. Neither section 703(m) nor section 701(m) requires that that demonstration be made with any particular type of evidence.

The dispute regarding whether direct evidence is required by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is irrelevant to the resolution of this case. The opinions in *Price Waterhouse* concern the meaning of the phrase "because of" in section 703(a). The "a motivating factor" language of section 703(m) has effectively supplanted the "because of" requirement in section 703(a). Proof of an illicit motivating factor is sufficient to establish liability (under section 703(m)) without regard to whether the evidence also shows discrimination "because of" that factor (under the original section 703(a)).

The United States suggests that circumstantial evidence is of uncertain reliability, and that only direct evidence could give courts "a high degree of confidence." But if a criminal defendant were to suggest that only "direct evidence" could prove guilt beyond a reasonable doubt, the Solicitor General would surely, and properly, object. In an appropriate case, a jury could sentence a defendant to death on the basis of circumstantial evidence.

Petitioner's proposal that certain types of discrimination claims can only be established by "direct evidence" has no precedent in the law. In both civil and criminal proceedings circumstantial evidence is universally as acceptable as direct evidence, and would have been sufficient to support any other claim brought against, or by, Caesars. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508 n.17 (1957). Plaintiffs alleging intentional discrimination in violation of Title VII should not be obligated to adduce a special type of evidence not required in any other area of the law.

Litigation in which a plaintiff relies on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and disputes involving mixed motives are not two mutually exclusive types of Title VII cases. Rather, *McDonnell Douglas* and its progeny concern a method for proving the existence of an unlawful *motive*, while a mixed-motives analysis is a method of allocating the burden of proof regarding *causation*.

ARGUMENT

I. INSTRUCTION NO. 9 IS CONSISTENT WITH SECTION 703(m) OF TITLE VII

This case involves an unremarkable application of section 703(m) of Title VII, 42 U.S.C. § 2000e-2(m). That section provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 703(m) was added by the 1991 Civil Rights Act. A limitation on the relief available for a violation of this section is established by section 706(g)(2)(B).

Instruction No. 9 in the instant case closely tracks the language of section 703(m).

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender *was a motivating factor* in any such work conditions imposed upon her. Gender refers to the quality of being male or female.
>
> If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

(J.App. 32-33) (Emphasis added).[18] This instruction is essentially similar to the model instructions used in other circuits.

Petitioner has never objected to Instruction No. 9. In the district court petitioner expressly agreed to this instruction. When the trial judge reviewed the proposed instructions, counsel for petitioner remarked, "We have no objections to the Court's instructions 1 through 9." (Tr. 460). In the district court petitioner itself, expressly citing section 703(m), proposed a similar instruction that would have authorized liability on a finding that gender had

[18] In the original instructions, and thus in Joint Appendix, the number of each instruction appears *after* the instruction itself.

been "a motivating factor." (J.App. 24). Petitioner neither objected to nor even mentioned Instruction No. 9 in its briefs in the court of appeals, in the petition for writ of certiorari, or in its merits brief in this Court.

The gravamen of petitioner's argument is that a "mixed motive" instruction cannot be given in the absence of "direct evidence." It is unclear how this argument, even if sound, would bear on the propriety of Instruction No. 9; petitioner itself does not suggest that Instruction No. 9 raises any problems. Section 703(m) is not *limited* to cases in which an employer has acted with multiple motives. Under the plain language of that provision, a plaintiff can establish a violation simply by proving that gender or any other impermissible consideration was "a motivating factor" in her dismissal or any other adverse action. Where a plaintiff has done so, liability will exist "even though other factors also motivated the practice." But nothing in section 703(m) requires a plaintiff to establish that an employer did indeed also have *other* additional motives. The words "other factors also motivated the practice" are preceded by "even though", not by "provided." Liability exists regardless of whether (not if and only if) other motives are present. Where a plaintiff demonstrates that gender was "a motivating factor," an employer assuredly could not defeat that section 703(m) claim by insisting that gender was its *only* motive, so that the case did not involve "mixed motives." Even if the parties stipulated that an employer had acted with only one motive, the nature of which was in dispute, the plain language of section 703(m) would still apply.

If there is a basis for objecting to Instruction No. 9, and the verdict which rested on it, that objection would have to be that a section 703(m) claim requires not only that a plaintiff prove the existence of "a[n impermissible] motivating factor", but *also* that the plaintiff offer "direct

evidence" of the presence of that motive. It is unclear whether petitioner, or the amici urging reversal, advance such an interpretation of the language of section 703(m). It is entirely clear, however, that section 703(m) contains no such requirement.

The United States[19] appears to suggest that the term "demonstrates" in section 703(m) should be construed to mean something like "demonstrates with direct evidence." (U.S. Br. 20). But "demonstrate" means "show" or "prove" (as opposed to, for example, "allege" or "contend"). "Demonstrate" carries with it no additional meaning regarding *how* the demonstration is to occur. To the contrary, it would be paradoxical to assert that Costa demonstrated that gender was a motivating factor, in the sense that she so convinced the jury, and yet that she failed to so "demonstrat[e]" within the meaning of section 703(m).

Other provisions in Title VII emphatically preclude such a peculiar interpretation of the term "demonstrates". Section 701(m), 42 U.S.C. § 2000e-(m), contains a specific definition of this very word. "The term 'demonstrates' means meets the burdens of production and persuasion." Section 701(m) clearly does not require that those burdens be met with any particular kind of evidence. Especially where Congress has expressly defined a statutory term, the courts assuredly are not free to craft some other definition. The very purpose of such a statutory definition is to delineate the meaning of the term in question wherever it may appear in a statute. The section 701 definitions are controlling "[f]or the purposes of this title" – the entirety of Title VII.

[19] The Equal Employment Opportunity Commission has not joined in the brief filed by the Department of Justice.

The definition of "demonstrates" in section 701(m) cannot plausibly be construed to contain a requirement that the requisite demonstration be based on direct evidence. Section 701(m) provides a single definition of the term for all of Title VII. If section 701(m) itself were construed to have an unspoken requirement of "direct evidence", that interpretation would wreak havoc in the interpretation and application of Title VII. The term "demonstrate" is used in four other provisions of Title VII in addition to section 703(m). In some instances these provisions refer to what must be demonstrated by a plaintiff; in others they describe how an employer can establish a defense or reduce its liability by demonstrating certain facts.[20] It is quite inconceivable that Congress could have intended section 701(m) to impose in all of these sections a requirement that the fact in question be established by "direct evidence." The term "demonstrates" also occurs twice in the provision enacted as part of the 1991 Civil Rights Act providing for compensatory and

[20] Section 706(g)(2)(B) provides a partial defense to a section 703(m) claim where the employer "demonstrates" that it would have taken the same action even in the absence of the impermissible factor. If the employer does so, the plaintiff can still obtain costs and attorneys fees "demonstrated" to be directly attributable to the section 703(m) claim.

Under section 703(k)(1)(A)(i) the plaintiff in a disparate impact case must "demonstrat[e]" that an employment practice has a disparate impact on the basis of race, color, religion, sex, or national origin. If that occurs, the employer may be able to avoid liability if it can "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." Under section 703(k)(1)(A)(ii) the plaintiff can overcome that defense with a "demonstration" that an appropriate alternative business practice exists. Section 703(k)(1)(A)(iii) provides the employer can avoid liability altogether through a "demonstration" that the practice in question did not cause the disparate impact.

punitive damages under Title VII and the Americans With Disabilities Act. 42 U.S.C. § 1981a.[21]

The United States argues that "demonstrates" must mean "demonstrates with direct evidence" because Justice O'Connor, who favored a direct evidence requirement in *Price Waterhouse*, also used the term "demonstrate" in her opinion. (U.S. Br. 6). But the word "demonstrate" is not a newly coined term first used and explained in Justice O'Connor's opinion; it had been utilized in innumerable other opinions and statutes prior to the enactment of the 1991 Civil Rights Act. Justice O'Connor's concurring opinion in *Price Waterhouse* did not purport to establish some special meaning of the term "demonstrate" or to suggest that "demonstrate" *means* "prove with direct evidence."[22] She used the term "demonstrate" (490 U.S. at 275) interchangeably with other words, such as "show" (490 U.S. at 265, 267, 274, 276, 277), "proof" (490 U.S. at 268), and "convinc[e]" (490 U.S. at 269). The government's argument might as plausibly been made if section 703(m)

[21] Punitive damages can be awarded if the plaintiff "demonstrates the respondent engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Conversely, in a reasonable accommodation case under the ADA or the Rehabilitation Act, a defendant can avoid liability for compensatory damages if it "demonstrates good faith efforts" to provide such an accommodation. 42 U.S.C. § 1981a(a)(3).

[22] To the contrary, Justice O'Connor's opinion endorsed shifting the burden of persuasion "where an employee has demonstrated by direct evidence that an illegitimate factor played a substantial role in a particular employment decision." 490 U.S. at 275. The additional words "by direct evidence" would have been entirely superfluous if Justice O'Connor thought that "demonstrated" *meant* "proved with direct evidence."

had required a plaintiff to "show" or "prove" that an impermissible criterion had been a motivating factor.

If the term "demonstrates" does not itself contain a "direct evidence" requirement, it is clear that such a requirement cannot simply be engrafted onto section 703(m). A plaintiff who proves the existence of an unlawful motivating factor has done all that the language of section 703(m) itself requires, regardless of what type of evidence was used. An additional "direct evidence" requirement would constitute an unwritten exception to the terms of the statute. But section 703(m) states that the specified demonstration will establish liability "[e]xcept as otherwise provided in this title." The requirement that such an exception be specified in the text of another provision of Title VII (i.e., in section 706(g)(2)(B)) precludes the courts from engrafting onto section 703(m) any other non text-based exceptions.

When Congress wishes to establish a heightened proof requirement, it does so expressly. The United States Code contains numerous such provisions, such as requirements that certain facts be proved "beyond a reasonable doubt,"[23] or by "clear and convincing evidence."[24] On the other hand, no provision in the United States Code requires "direct evidence", in either a civil or criminal case; the only references to "direct evidence" are in federal statutes which provide that such evidence is *not* required.[25] Every

[23] *E.g.*, 10 U.S.C. § 906a(c); 18 U.S.C. §§ 1467(e)(1), 1623(e), 2253(e), 3591(a)(2), 3593(c).

[24] *E.g.*, 5 U.S.C. §§ 1214(d)(4)(B)(ii), 1221(e)(2); 8 U.S.C. §§ 1154(a)(2)(A)(ii), 1158(2)(B), 1229a(c)(3)(A).

[25] *See* 21 U.S.C. § 863(e)(6) (direct or circumstantial evidence sufficient), 18 U.S.C. §§ 892(c) (court may allow use of any evidence "tending to show" facts at issue if direct evidence unavailable), 1469(a) (same).

reference to circumstantial evidence in the United States Code expressly permits its use.[26]

The United States objects that a "direct evidence" requirement should be created *because* section 703(m) has the effect of "expanding liability" under Title VII. (U.S. Br. 10). The government offers no explanation, and none is readily imaginable, for a rule of construction under which broadening the scope of Title VII should be deemed an evil to be counteracted wherever possible by judicial construction. There is, after all, no special rule of lenity for biased employers. Why legislation according greater protections to victims of invidious discrimination should be construed with such a jaundiced eye the Solicitor General does not say. Why the Civil Rights Division should endorse such an approach to the very laws which it enforces is assuredly difficult to understand.

Finally, the United States asserts that to establish a section 703(m) claim a plaintiff must show that race or gender "was a *substantial*, motivating factor." (U.S. Br. 9, 10, 29) (Emphasis added). The proposed requirement that the impermissible consideration also have been "substantial" simply is not in the text of the statute, and the government makes no effort to explain why this Court should engraft onto section 703(m) such an additional element. The decision in *Price Waterhouse* can fairly be understood to contain just such a requirement, since both Justice White (490 U.S. at 259) and Justice O'Connor (490 U.S. at 265) maintained that the appropriate standard was a "substantial" motivating factor. Because the votes of either Justice White or Justice O'Connor were necessary to create a majority, this requirement is part of the holding

[26] 5 U.S.C. § 1221(e)(1); 21 U.S.C. § 863(e)(6); 22 U.S.C. § 1319(c)(3)(B)(II); 42 U.S.C. §§ 6928(f)(2)(B), 7413(c)(5)(B).

of the Court. But section 703(m) contains no such requirement, because Congress chose not to use the word "substantial" in the language of the statute.

II. INSTRUCTION NO. 10 IS CONSISTENT WITH SECTION 706(g)(2)(B) OF TITLE VII

Section 706(g)(2)(B) provides an important partial defense to a claim based on section 703(m):

> On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly applicable only to the pursuit of a claim under section 703(m),and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

This partial defense was reflected in Instruction No. 10. Although subsection (ii) bars a number of different remedies if the defense is established, the only one of those remedies ordinarily awarded by a jury is damages. Accordingly, Instruction No. 10 directed the jury to withhold any award of damages if it found that petitioner would have taken the same action regardless of Costa's gender.

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of

the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

I will provide the jury with a form so that it can report a special interrogatory on the jury's finding on this question.

(J.App. 33-34).[27]

The section 706(g)(2)(B) partial defense is contained in the second paragraph of Instruction No. 10. In his closing argument, counsel for Caesars expressly urged the jury to sustain that defense, arguing the petitioner would have taken the same actions against Costa even if she had been a man. Referring to the special verdict question regarding the section 706(g)(2)(B) defense, petitioner's attorney argued:

> [I]n question three there, it says if the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision.
>
> You put a yes there because what that's saying, if you get to that question, I don't think you have to, but if you get to that question, go through, you're saying, okay, when Caesars was dealing with Ms. Costa, whether they had their eyes open and said she was a woman, or had their eyes closed, the same result would have happened, and I believe that's what you should conclude when you're in the jury room.

(Tr. 658-59). Although the jury found that gender was not the only motive behind Costa's dismissal, it also concluded that petitioner would not have treated Costa in the same manner if she had been a man. (Pet. App. 88a-89a; J.App. 40).

The second paragraph of Instruction No. 10 (unlike Instruction No. 9) specifically addresses the mixed-motive situation. In the courts below, as here, Caesars vociferously objects to this aspect of Instruction No. 10.[28] This objection at first blush seems somewhat peculiar; the section 706(g)(2)(B) partial defense in Instruction No. 10 was to Caesars' advantage, because it permitted the defendant to avoid an award of damages if liability were found under Instruction No. 9.

Although the matter is not free from doubt, the gravamen of Caesars' objection to Instruction No. 10 seems to be that the district court should have placed on Costa (rather than on Caesars) the burden of establishing whether or not, for legitimate reason or reasons, she would have been treated in the same way even if Caesars had not considered her gender. On that view, the second paragraph of Instruction No. 10 should have been drafted something like this:

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[27] In the original instructions, and thus in Joint Appendix, the number of each instruction appears *after* the instruction itself.

[28] Petitioner also appears to argue that the first sentence of this instruction in effect directed the jury to find that gender had been a motivating factor. (Pet. Br. 44). The court of appeals properly concluded that any such objection had been waived. (Pet. App. 34a).

> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is *not* entitled to damages unless the *plaintiff* proves by a preponderance of the evidence that the defendant would have treated plaintiff *differently* if the plaintiff's gender had played no role in the employment decision.[29]

The simple answer to such a contention is that the plain language of section 706(g)(2)(B) is precisely to the contrary. Section 706(g)(2)(B) does not require the plaintiff to make such an additional showing in order to *obtain* damages; rather, that section places on the defendant the burden of making the opposite showing in order to *avoid* a damage award.

In the alternative, Caesars may be contending somewhat more narrowly that section 706(g)(2)(B) – or, more precisely, the allocation of the burden of proof contained in that section – does not apply in all section 703(m) cases, but only to section 703(m) cases in which the plaintiff has established a violation by "direct evidence." Again, however, such a proposed limitation on section 706(g)(2)(B) cannot be squared with the plain language of the statute itself. Section 706(g)(2)(B) applies "[o]n a claim in which an individual proves a violation under section 703(m)". Section 706(g)(2)(B) is applicable to *all* claims based on section 703(m); nothing in the text of that provision permits a court to apply a different rule because of the type of evidence that the plaintiff utilized in establishing that violation under section 703(m).

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[29] Petitioner did not actually propose any instruction of its own regarding proof of causation. *See* J.App. 22-27.

III. THE INCLUSION OF A "DIRECT EVIDENCE" REQUIREMENT IN SECTIONS 703(m) OR 706(g)(2)(B) IS NOT REQUIRED BY THE DECISION IN *PRICE WATERHOUSE V. HOPKINS*, 490 U.S. 228 (1989)

Petitioner's proposed interpretation of sections 703(m) and 706(g)(2)(B) rests largely on its reading of this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Price Waterhouse*, Caesars' claims, held that in a Title VII case the burden of proof on the issue of causation did not shift to the defendant unless the plaintiff's discrimination claim was supported by "direct evidence." (Pet. Br. 11-15). When Congress adopted the 1991 Civil Rights Act, petitioner insists, it intended to alter only one unrelated aspect of that decision, leaving the "direct evidence" requirement unchanged. (Pet. Br. 20-22).

(1) The simplest answer to this whole line of argument is that *Price Waterhouse* was not a generalized disquisition on the rationale of Title VII, but an interpretation of a specific phrase in section 703(a) of the statute. The discrimination claim in *Price Waterhouse* was brought under section 703(a), which requires a plaintiff to prove that she was discriminated against "because of" her gender. The opinions in that case were directed at construing the phrase "because of" in section 703(a). (490 U.S. at 249 (plurality opinion), 262 (O'Connor, J., concurring), 281 (Kennedy, J., dissenting)).

Section 703(m) does not purport to amend section 703(a) by clarifying the words "because of"; to the contrary, section 703(m) is a new and distinct provision which entirely supplants the phrase "because of" wherever it

appears in Title VII.[30] Section 703(a) makes an employment practice unlawful whenever a prohibited criterion was "a motivating factor", *regardless* of whether the practice occurred "because of" (as explicated by *Price Waterhouse*) that criterion. An employer could be liable under section 703(m) even if it were not liable under section 706(a) alone. That is precisely what would occur if the plaintiff proved that an unlawful consideration were "a motivating factor" (all that is required by section 703(m)), but not that it was "a *substantial* motivating factor" (as required in a section 703(a) case by the holding in *Price Waterhouse*). The fact that section 706(g)(2)(B) provides a limitation on liability in the case of "a violation under section 703(m)" makes clear that an employer can violate Title VII under section 703(m) even if there was no violation of section 703(a) by itself.

In this case, however, Instructions Nos. 9 and 10 concern liability under section 703(m) and the related defense to a section 703(m) claim that is provided by section 706(g)(2)(B). Neither section 703(m) nor section 706(g)(2)(B) use the phrase "because of". Thus the construction that the Court gave in *Price Waterhouse* to the words "because of" is simply irrelevant to the meaning of sections 703(m) and 706(g)(2)(B).

[30] The phrase "because of" also appears in sections 703(b), 703(c), 703(d) and 704(a); section 703(m) would apply as well to claims under section 703(l) and 717(a). Congress presumably chose to enact a single provision like section 703(m), rather than insert substitute language in existing provision, because such language would have had to be added to seven different sections of Title VII.

Petitioner objects that if the interpretation of sections 703(m) and 706(g)(2)(B) are not conformed to the meaning of *Price Waterhouse*, then the method or standard of proof under Title VII would differ from that under other statutes, such as the ADEA, to which (they assume) *Price Waterhouse* would still apply. (Pet. Br. 26-27). But that is precisely the choice that Congress made in 1991 when it added sections 703(m) and 706(g)(2)(B) to Title VII alone, with no similar amendments to other anti-discrimination laws.

(2) Petitioner's proposed interpretation of *Price Waterhouse* rests on Justice O'Connor's concurring opinion, which admittedly does urge that under section 703(a) the burden of proof regarding causation cannot shift to a defendant unless the plaintiff offers "direct evidence."[31] Justice O'Connor's concurring opinion "is the holding of the Court", Caesars urges, because her vote was necessary to constitute a majority in favor of the Court's judgment. (P.Br. 14-15). Under *Marks v. United States*, 430 U.S. 188, 193 (1977), "[w]hen a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those members who concurred in the judgments on the narrowest ground."

The fatal defect in Caesars argument is not jurisprudential but mathematical. The total number of justices who concurred in the judgment in *Price Waterhouse* is not five but *six*. Justice White also concurred in the judgment, and his concurring opinion emphatically contains no

[31] As we explain below, petitioner's view of what would constitute "direct evidence" is far narrower than that of Justice O'Connor.

mention whatever of "direct evidence." Thus a total of five justices (the plurality together with Justice White) agreed that direct evidence was not needed to shift the burden of proof under *Price Waterhouse*.[32] Justice O'Connor's sixth vote was not necessary to produce a majority, and thus does not play a role in ascertaining the holding of the Court. The outcome in *Price Waterhouse* would have been the same even if Justice O'Connor had dissented. The "narrowest ground" rule in *Marks* is applicable only to a 5-4 decision.

Both petitioner and the United States contend that the plurality opinion in *Price Waterhouse* endorsed Justice O'Connor's direct evidence proposal, relying on their interpretation of footnote 13 of the plurality opinion. (Pet. Br. 37 n.21; U.S. Br. 12, 15). There is, however, no need to tease meaning out of footnote 13 in order to ascertain the plurality's position on this issue; the plurality repeatedly addressed that issue quite specifically in the text of its opinion. The plurality expressly rejected Price Waterhouse's contention that Hopkins was required to adduce direct evidence.

> Price Waterhouse concedes that the proof in [*NLRB v.*] *Transportation Management*, [462 U.S. 393 (1983),] adequately showed that the employer there had relied on an impermissible motivation in firing the plaintiff. . . . But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was

[32] *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1182-83 (2d Cir. 1992) ("[W]hat we must do is find common ground shared by five or more justices. . . . The requirement of 'direct evidence' was not . . . adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition.")

> that the employer harbored a grudge toward the plaintiff on account of his union activity; *there was* contrary to Price Waterhouse's suggestion, *no direct evidence* that that grudge had played a role in the decision, and, in fact, the employer had given other reasons in explaining the plaintiff's discharge. See 462 U.S. at 396. If the partnership considers that proof sufficient, we do not know why it takes such vehement issue with Hopkins' proof.

490 U.S. at 257 (Emphasis added).[33]

Footnote 13 in the plurality opinion concerns, not what type of evidence a plaintiff must introduce, but what that evidence must prove. The text of the plurality opinion to which footnote 13 is appended reads as follows:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a

[33] Elsewhere the plurality disavowed any limitation on the type of evidence on which a plaintiff might rely, expressly noting Justice O'Connor's view to the contrary.

> "By focusing on Hopkins' specific proof, however, we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, "standing alone," would or would not establish a plaintiff's case, since such a decision is unnecessary in this case. But *see post*, at 277 (O'Connor, J., concurring in judgment)."

490 U.S. at 251-52. Similarly, the plurality explained that the burden of proof on causation would be shifted to the defendant if a plaintiff is able "to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision." 490 U.S. at 247 n.12. This articulation of the traditional preponderance of the evidence standard contains no special evidence requirement.

> truthful response, one of those reasons would be that the applicant or employee was a woman.

490 U.S. at 250. The relevant portion of footnote 13 states:

> After comparing *this description* of the plaintiff's proof to that offered by Justice O'Connor's opinion, concurring in the judgment, *post*, at 276-77, we do not understand why the concurrence suggests that they are meaningfully different from each other, see *post* at 275, 277-79.

490 U.S. at 250 n.13 (Emphasis added). Responding to footnote 13, Justice O'Connor explained that the difference that she (but not the plurality) thought significant was that she would have required the plaintiff to present sufficient evidence to support a finding that the decision was "because of" an impermissible factor.

> It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. See *ante*, at 250 n. 13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.

490 U.S. at 277-278. Petitioner's effort to tease out of footnote 13 an endorsement of a "direct evidence" rule is thus unavailing. Its unsuccessful attempt to do so demonstrates the wisdom of this Court's admonition that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States

Reports as though they were in the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

The United States repeatedly asserts that the plurality (as well as Justices White and O'Connor) insisted that "a plaintiff in a mixed-motive case must meet a *heightened burden of proof* by presenting evidence that discriminatory intent played a substantial, motivating role in the challenged employment decision." (U.S. Br. 11; *see id.* at 13). The normal burden of proof is by a preponderance of the evidence; a heightened burden of proof would mean that a plaintiff would have to show the existence of an impermissible motive by clear and convincing evidence, or beyond a reasonable doubt. The government, however, points to absolutely nothing in any of the opinions which favors such a heightened burden. The plurality expressly endorsed the preponderance of the evidence standard. 490 U.S. at 247.

Petitioner and the United States contend that the holding of *Price Waterhouse* can be ascertained by looking at how the dissenting opinion described the judgment to which it objected. (Pet. Br. 16; U.S. Br. 12, 15). This Court, however, has not regarded dissenting opinions as an appropriate guide to the meaning of the opinions with which they disagree. To the contrary, it is not unheard of for dissenters to seek to recharacterize the holding of the Court in a manner closer to the minority view.

In this instance the portion of the dissenting opinion relied on by petitioner and the United States is as follows:

> I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment action would have been

> supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 276-77 (opinion of O'Connor, J.); *ante*, at 259-60 (opinion of White, J.).

490 U.S. at 280 (Kennedy, J., dissenting). But while Justice White and Justice O'Connor would have required that the unlawful motive was "a substantial factor", only Justice O'Connor would have required "direct evidence."

Finally, the United States and petitioner contend that the legislative history of sections 703(m) and 706(g)(2)(B) indicates that Congress intended to overturn only one portion of the Court's holding in *Price Waterhouse*, the ruling that an employer would escape liability completely by showing that it would have taken the same action even in the absence of the illegitimate criterion. (Pet. Br. 21-22; U.S. Br. 14, 18, 22). This argument is unpersuasive for three distinct reasons. First, there is simply no relevant ambiguity in sections 703(m) and 706(g)(2)(B) that would justify resort to the legislative history. Second, because the holding in *Price Waterhouse* did not include any direct evidence requirement in the first place, a statute codifying *Price Waterhouse* (which sections 703(m) and 706(g)(2)(B) assuredly are not) would not codify, let alone create, such a requirement. Third, there is no indication that Congress misunderstood *Price Waterhouse* to adopt such a requirement.

The fallacy of this sort of reliance on *Price Waterhouse* is illustrated by the government's suggestion that the Court construe section 703(m) to require a showing that an impermissible consideration was not merely "a motivating factor" (the actual language of the statute), but "a

substantial motivating factor." (U.S. Br. 9, 10, 29) (Emphasis added). As we have explained, the holding of *Price Waterhouse* does indeed embody a requirement that the motivating factor be "substantial". (*See* pp. 16-17, *supra*). The legislative history evidently contains no assertion that Congress had decided to overrule (or indeed ever considered) this aspect of *Price Waterhouse*. Yet neither the holding in that decision nor the absence of such legislative history could possibly provide a basis for engrafting onto section 703(m) a "substantial[ity]" requirement that simply is not in the text of the statute.

IV. THE ADDITION OF A "DIRECT EVIDENCE" REQUIREMENT TO SECTIONS 703(m) OR 706(g)(2)(B) IS NOT NECESSARY TO AVOID ANY CONFLICT WITH THE METHOD OF PROOF ESTABLISHED BY *MCDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 792 (1973)

(1) A literal application of sections 703(m) and 706(g)(2)(B) would not conflict in any way with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. A plaintiff might rely on the *McDonnell Douglas* methodology to establish a claim under section 703(m); petitioner itself proposed an instruction that combined the section 703(m) standard (proof of "a motivating factor") with a *McDonnell Douglas* methodology (proof of pretext.) (J.App. 24-25).

Litigation in which a plaintiff relies on *McDonnell Douglas* and disputes involving mixed motives are not two distinct, mutually exclusive types of Title VII cases. Rather, as the Ninth Circuit correctly observed, the *McDonnell Douglas* caselaw and the mixed-motives analysis each address quite distinct issues. (Pet. App. 31a).

McDonnell Douglas concerns one manner in which a plaintiff might establish the existence of an unlawful *motive*. A mixed-motives analysis (under either section 703(m) or *Price Waterhouse*), on the other hand is a method of allocating the burden of proof on *causation*, after a plaintiff, by reliance on *McDonnell Douglas* or otherwise, has demonstrated the existence of an impermissible motive.

In all cases the burden of proof as to the existence *vel non* of a discriminatory motive remains on the plaintiff. If a plaintiff demonstrates that an illegitimate consideration was "a motivating factor", that will establish liability under section 703(m). The combined effect of sections 703(m) and 706(g)(2)(B) will then be to place on the employer the burden of proof regarding causation. Because, however, motive and causation are two distinct issues, a literal application of sections 703(m) and 706(g)(2)(B) is entirely consistent with the *McDonnell Douglas* cases.[34]

Petitioner asserts that under the decision of the Ninth Circuit the mere existence of a prima facie case will shift

[34] These two issues typically arise at different phases of the litigation. Once an employer offers "admissible evidence sufficient for the trier of fact" to find it acted for a legitimate reason, " 'the *McDonnell Douglas* framework – with its presumptions and burdens' – disappear[s], *St. Mary's Honor Center*, 509 U.S.] at 510, and the sole remaining issue [is] 'discrimination *vel non*.' [*United States Postal Service Bd. of Govs. v.] Aikens*, [460 U.S. 711] at 714." *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 142-43 (2000). Thus the *McDonnell Douglas* framework will usually be of little relevance once a Title VII case has survived a motion for summary judgement. The causation issue, on the other hand, only arises if and when, following the presentation of all the evidence, the trier of fact finds that an unlawful consideration was a motivating factor.

the burden of proof with regard to causation. (Pet. Br. 29). The court of appeals did not so hold. To the contrary, the allocation of the burden of proof embodied in section 706(g)(2)(B) occurs only after a plaintiff has *demonstrated* that an impermissible consideration was a motivating factor. That burden is not shifted merely because the plaintiff has established a prima facie case. To the contrary, section 703(m) expressly requires that the trier of fact must actually *find* the existence of an unlawful motivating factor, and the district court specifically so instructed the jury in this case.

Petitioner objects that under a literal reading of sections 703(m) and 706(g)(2)(B), a jury could be given instructions under those provisions of Title VII whenever a plaintiff had a triable issue of fact under *McDonnell Douglas*. But there is nothing remarkable about that consequence. Such instructions would not suggest that the employer bore the burden of proof on the issue motivation; section 703(m) is expressly to the contrary, particularly when read in conjunction with the definition of "demonstrates" in section 701(m). Nor would such instructions mean that the burden of proof regarding causation would be placed on the employer whenever a plaintiff had a triable issue of fact regarding whether an impermissible consideration was a motivating factor. Again, both section 703(m) and section 706(g)(2)(B) make clear – as did Instruction No. 9 – that the burden of proof regarding causation falls on the employer only if the trier of fact makes a *finding* that such a motivating factor was present. Petitioner does not suggest that the instructions actually given in this case placed on defendant the burden of proof regarding motivation, or that those instructions, absent an actual finding of unlawful motivation, shifted to the defendant the burden of proof regarding causation.

The gravamen of petitioner's objection may be that, as occurred here, a court will give a section 706(g)(2)(B) instruction whenever a plaintiff has a triable claim of a section 703(m) violation. Thus a prima facie case of a section 703(m) violation, coupled with enough evidence to create a triable issue of fact, will lead to the giving of such an instruction. But that is the inevitable result of the fact that, where a jury has been requested, it will be for the jury, not the court, to decide whether gender or race was a motivating factor. It obviously would not be practicable to bifurcate a Title VII trial, with the jury first resolving under section 703(m) whether there was an impermissible motivating fact, and then, if such a violation was found, returning for separate instructions and deliberations regarding causation.

(2) It is entirely possible that in a case in which a plaintiff relied on the principles of *McDonnell Douglas*, the trier of fact might conclude that multiple motives were involved. Under *McDonnell Douglas* and its progeny, a plaintiff must first make out a prima facie case that an impermissible motive was involved. Where that has occurred, the burden shifts to the employer to articulate through admissible evidence a legitimate reason (or possibly several) for the disputed action. If the employer does so, the plaintiff has the burden of persuading the trier of fact that such an unlawful motive indeed existed. The primary function of *McDonnell Douglas* and its progeny is to compel the employer to offer evidence of that reason. Once it has done so the presumption created by the prima facie case drops from the case, and the plaintiff's burden – to demonstrate the existence of an unlawful motive – is the same as it would be in any intent case.

As this Court has repeatedly noted, an employee might rely on either or both of two distinct types of

evidence to meet this burden. The plaintiff may meet that burden "either *directly* by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer's proffered reason is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (Emphasis added); *see St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 517 (1993) (same); *United States Postal Service Bd. of Gov's. v. Aikens*, 460 U.S. 711, 716 (1983) (same).[35]

In a case which proceeded under *McDonnell Douglas*, it would be entirely possible for the trier of fact to conclude that several motives, including but not limited to an unlawful motive, were at work. First, the trier of fact might be persuaded largely by the more direct evidence that an impermissible motive was present; in that instance the trier of fact might also believe that the employer's proffered reason, rather than being false, was in fact a consideration, although not the only one. Second, the trier of fact might be convinced by the plaintiff's evidence that the employer's proffered reason, although

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[35] Both types of evidence were relied on by the plaintiff in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000). First, the plaintiff there adduced substantial evidence "that [the employer's] explanation was false." 530 U.S. at 144. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of an explanation that the employer is dissembling to cover up a discriminatory purpose." 530 U.S. at 147. Second, Reeves offered more direct evidence that showed (independent of the falsity *vel non* of the employer's proffered explanation) that his dismissal was the result of age discrimination. The evidence directly suggesting the existence of such an unlawful purpose included age-biased remarks by a key company official, a pattern of harassment that was not directed at younger workers, and an incident where only Reeves, but not a similarly situated younger employee, had been disciplined. 530 U.S. at 151.

present, was not sufficient by itself to account for the adverse action in question, and then infer that the alleged unlawful reason was also (but not exclusively) involved.[36] Third, even if the trier of fact concluded that the employer's proffered explanation was false (i.e., that it was not among the reasons the employer had in mind at the time), a finding that would preclude a conclusion that *that* legitimate motive was present along with some impermissible consideration, the trier of fact might nonetheless determine that some *other* legitimate reason was also present. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523 (1993).

In *Reeves* itself this Court analyzed the evidence under *McDonnell Douglas*. Yet it is entirely possible that on the record in that case a reasonable jury might have concluded not only that age was a motivating factor in Mr. Reeves' dismissal, but also that at the time of that dismissal company officials were concerned as well with low productivity in the department which Reeves managed.

Proof under *McDonnell Douglas* that there was an unlawful motivating factor would preclude the existence of mixed-motives only if the parties had stipulated that there had been one and only one motive at work, which had to be either that unlawful motive or the employer's proffered explanation. In actual litigation, however, such stipulations simply do not occur. Were such a stipulation agreed to, moreover, it would also bar a finding of mixed-motives even if the plaintiff relied exclusively on "direct evidence."

[36] In *Reeves*, for example, the plaintiff offered evidence tending to show that the infractions of which he was accused were too minor by themselves to have led to his dismissal. 530 U.S. at 144-45.

Pretext is not some distinct type of discrimination (like a disparate impact claim), but simply one method of proving the existence of a discriminatory purpose. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Petitioner's error stems in part from the fact that the term "pretext" can have one of several different meanings.[37] *McDonnell Douglas* requires a plaintiff to respond to an employer's proffered explanation by proving that it is "pretextual". A proffered reason could be said to be pretextual if (1) the reason was not a motivating factor at the time of the disputed action, but had been invented at a later date to hide the unlawful reason, or if (2) the legitimate reason had in fact been a consideration at the time of that decision, but the employer was falsely insisting that that was its sole reason in order to hide the existence of an additional, unlawful motive. Put otherwise, a defense witness who testified that the legitimate consideration was "the reason for the action" might be lying because that consideration was not a reason at all, or be lying because it was not "the" reason, there in fact being one or more additional purposes involved.[38]

[37] *See, e.g., Wolf v. Buss (America)*, 77 F. 3d 914, 919 (7th Cir. 1996); *Renz v. Spokane Eye Clinic*, 114 Wa. App. 611, 619 (2002).

[38] Two historical examples illustrate these distinct meanings. At the outset of World War II, Germany invaded Poland on the pretext that Polish forces had attacked Germany. This was a pretext in the first sense; no such Polish attack had ever occurred. At Munich, Hitler asserted that he wanted much of Czechoslovakia ceded to Germany so that the Sudeten Germans in that region would be in the Third Reich. That explanation was pretextual in the second sense. There were in fact Sudeten Germans in western Czechoslovakia, and Hitler undoubtedly wanted to have them within the expanded German borders, but he had other military and economic reasons for seeking to annex much of Czechoslovakia.

V. PETITIONER'S PROPOSED "DIRECT EVIDENCE" REQUIREMENT IS NEITHER CLEAR NOR WORKABLE

"As in any lawsuit, the plaintiff [in a Title VII case] may prove his case by direct or circumstantial evidence." *United States Postal Service Bd. of Gov's*, 460 U.S. 711, 713 n.2 (1963). Petitioner and the United States, however, urge this Court to create a classification system dividing Title VII discriminatory intent cases into two distinct categories with separate methods of proof and different burdens of proof regarding causation: "mixed-motive" cases and *McDonnell Douglas* cases.

(1) In its 1988 brief in *Price Waterhouse*, the United States correctly objected to the type of distinction which it now proposes:

> Congress recognized that virtually every disparate treatment case will to some degree entail multiple motives. Thus if the elements of Title VII liability or the burden of persuasion differs depending on the "proper" categorization of a case, . . . the predictable result will be pointless litigation over what label should be affixed to cases. . . . Although a number of courts have suggested that this framework [in *McDonnell Douglas* and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)] applies only to single motive cases, and that mixed motive cases must be analyzed under a different framework, we think that the *McDonnell Douglas-Burdine* framework is well suited to all disparate treatment cases.

Brief for the United States, Price Waterhouse v. Hopkins, No. 87-1167. In the instant case, however, the government now offers a complex standard for determining the

"'proper' categorization of a case", while candidly conceding that the standard for doing so "is not free from doubt." (U.S. Br. 28).

A system of categorization under which a judge must determine prior to trial whether a case involves mixed motives would be entirely unworkable. A judge could rarely if ever rule out the possibility that a jury might conclude that several motives were present. Thus petitioner and the United States propose to *define* a mixed-motive case as one in which there is "direct evidence." Thus (paradoxically) a case involving two or more motives, but no "direct evidence", would not be a mixed-motive case. Congress enacted sections 703(m) and 706(g)(2)(B) in the belief that "[v]irtually every Title VII disparate impact treatment case will to some degree entail multiple motives."[39] Because of the exceedingly narrow manner in which petitioner and the United States seek to define "direct evidence", the vast majority of cases involving multiple motives, paradoxically, would *not* be "mixed-motive cases."

The lower courts which have attempted to implement such a classification system have been unable to identify a coherent and principled definition of "direct evidence." As the First Circuit noted in *Fernandes v. Costa Bros. Masonry*, 199 F. 3d 572 (1st Cir. 1999), the lower courts have applied several quite inconsistent definitions, with conflicting decisions within a number of different circuits. "[T]he various circuits have about as many definitions for

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[39] H.R.Rep. 101-644, pt. 1, p. 31 (quoting Brief for the United States in *Price Waterhouse*); H.R.Rep. 101-644, pt. 2, 26 (same); S.Rep. No. 101-315, p. 24 (same); H.R.Rep. 102-40(I), p. 47; H.R.Rep. No. 102-40(II), p. 18.

'direct evidence' as they do employment discrimination cases." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1183 (2d Cir. 1992).[40] The Ninth Circuit in this case correctly concluded that

> courts and commentators have had even more difficulty articulating an order to the chaos. . . . The "direct evidence" quagmire results from just such a misdirected inquiry, and we decline to be drawn into it.

(Pet. App. 21a, 24a). For this reason a number of circuits have rejected this direct evidence rule outright,[41] or have eviscerated it by defining "direct evidence" to include any evidence, including circumstantial evidence, that demonstrates the existence of an unlawful motivating factor.[42]

The failure of efforts to fashion a definition of direct evidence has several distinct causes. The various proposed definitions of "direct evidence", including the definitions proposed by petitioner and the United States, are not based on any existing body of law. These definitions emphatically are not the standard of "direct evidence" long known to evidence law, a standard which is so narrow that it could not be met in an intent case. The established

[40] Justice Kennedy correctly foresaw this problem in *Price Waterhouse*, when he noted that if direct evidence were required to determine the allocation of the burden of proof on causation, "[c]ourts will . . . be required to make the subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence." 490 U.S. at 291 (dissenting opinion).

[41] *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1183-85 (2d Cir. 1992).

[42] *Wright v. Southland Corp.*, 187 F. 3d 1287, 1295-98 (11th Cir. 1999); *Thomas v. National Football League Players Ass'n*, 131 F. 3d 198, 204-05 (D.C.Cir. 1998).

evidentiary definition of direct evidence is testimony which, if truthful and accurate, conclusively and without any inferences, demonstrates the fact in question. 1A Wigmore, Evidence § 25 (Tillers rev. 1983);[43] 1 McCormick on Evidence 641 (1999). But that type of "direct evidence" is never available to prove intentional discrimination.[44] There are no eye witnesses to a person's state of mind; even testimony by a third party that a company official said to the plaintiff "I did not hire you because you are white" would not in this sense be direct evidence of racial motive.[45]

[43] *E.g.*, *Provette v. Faulkner*, 92 Nev. 353, 550 P. 2d 404, 406 (1976) ("[d]irect evidence is evidence which, if believed, proves the fact in issue without the aid of inference.")

[44] The only evidence meeting this standard would be testimony at trial by the decisionmaker involved that he indeed took the action complained of because of the plaintiff's race, religion, gender or national origin. With the possible exception of certain disputes regarding affirmative action, there are assuredly no Title VII cases in which the key defense witness so testified.

[45] "The only 'eyewitness' to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated." *Wright v. Southland Corp.*, 87 F. 3d 1287, 1295 (11th Cir. 1999) (Footnote omitted).

Testimony that a company official told the plaintiff "I didn't hire you because you are white" would be direct evidence that the official *said* that, but only circumstantial evidence that race was the actual motive. *Id.* at 1295 n.9. Even if the witness to this remark were believed, the testimony would not conclusively demonstrate the existence of a gender based motive; the company official may have been lying when he made the remark, in order to cover up some other more embarrassing motive (another candidate paid a bribe to get the job) or

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On the other hand, petitioner's proposed definition of "direct evidence" is also assuredly different from the reference in *Burdine*, *St. Mary's Honor Center*, and *Aikens*, to the manner in which a plaintiff might prove "directly" the existence of a discriminatory motive. (*See* p. 33, *supra*). As used in *Burdine* and its progeny, "directly" refers to all evidence of discrimination (*e.g.*, statistics, other discriminatory acts) other than proof that an employer's particular proffered explanation was untruthful.

Petitioner and the United States seek to fashion a new, third definition of "direct evidence", slightly less demanding than the definition in evidence law, but far more stringent than the usage in *Burdine*. But the enormous and unpredictable variety in the types of evidence adduced in discrimination cases is simply too complex to fit into any such system of categorization. The rationale for the "direct evidence" rule proffered by petitioner and the United States is simply to assure that any application of a mixed-motive analysis (by which, apparently, they mean any application of sections 703(m) and 706(g)(2)(B)) will be rare. (Pet. Br. 43; U.S. Br. 29). This frankly result-oriented approach involves no neutral principle that could inform the meaning of "direct evidence."

(2) Efforts to draw a plausible distinction between direct and non-direct evidence is confounded by the fact

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because he thought the applicant would find that explanation less offensive than the truth (he was incompetent).

"Even a highly-probative statement like 'You're fired, old man' still requires the factfinder to draw the inference that the plaintiff's age had a causal relationship to the decision." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1185 (2d Cir. 1992).

that such a distinction would have no necessary correlation by the strength or weakness of the evidence. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 508 n.17 (1957). Evidence that is "direct" – even as petitioner would define it – could be quite unpersuasive, while in some instances circumstantial evidence (or, more accurately, evidence that falls outside petitioner's proposed definition of "direct evidence"), might be virtually conclusive. "If juries can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling." *Tyler v. Bethlehem Steel Corp.*, 958 F. 2d 1176, 1184 (2d Cir. 1992);[46] *see Thomas v. National Football League Players Ass'n*, 131 F. 3d 198, 204 (D.C.Cir. 1997).

On petitioner's view, for example, direct evidence would be limited to evidence that a decisionmaker, in connection with the disputed employment decision, made a statement revealing unambiguous discriminatory animus. That standard would be met if a witness testified that he overheard Costa's supervisor remark, at a meeting regarding her dismissal, "I think we should fire Costa because she is a woman." That testimony, however, would be "direct evidence" even if the witness was a convicted perjurer, and a dozen disinterested witnesses testified that that witness had not even attended the meeting in question.

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[46] Petitioner expressly agreed to Instruction No. 3, which stated: "The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence." (J.App. 30).

Conversely, it would not be direct evidence if Costa could show that on the day she was dismissed the management of Caesars systematically fired every one of its thousands of female workers and replaced all of them with men. Similarly, the fact that a supervisor was a Grand Dragon of the Ku Klux Klan would not be direct evidence that a well qualified black or Jewish job applicant had been rejected because of race or religion.

Circumstantial evidence is relied on routinely, and sometimes exclusively, in criminal prosecutions; the criminal justice system places enough confidence in circumstantial evidence that capital defendants are convicted and executed based on just such evidence. Conversely, death row inmates convicted on the basis of exceedingly direct evidence – such as testimony from a jailhouse informant that the defendant confessed, or even a confession signed by the defendant himself – have subsequently been found to be innocent.

If it were proposed by a criminal defendant in this Court that criminal convictions, which must be based on proof beyond a reasonable doubt, required "direct evidence", we assume that the Solicitor General, at the behest of the Criminal Division, would vehemently (and properly) object. We do not understand why the Solicitor General, and indeed the Civil Rights Division, insist that circumstantial evidence is insufficiently reliable in a mixed-motive case to provide a basis for imposing damages on a Title VII defendant. It simply makes sense to base the analysis of Title VII cases on a distinction between direct and circumstantial evidence that the courts would not make in other areas of the law.

(3) The criteria proposed by petitioner and the United States for defining "direct evidence" pose considerable practical problems, and in some instances cannot be

reconciled with Justice O'Connor's conclusion that the record in *Price Waterhouse* itself involved what she regarded as direct evidence.

First, petitioner suggests that a statement reflecting discriminatory animus must have been made by the actual decisionmaker. (Pet. Br. 41).[47] In *Price Waterhouse* the actual decisionmaker was the firm's Policy Board. 490 U.S. at 232. But virtually all the remarks suggesting the existence of sexual stereotyping were made by partners who were *not* on the Board. 490 U.S. at 234. This proposed limitation would inevitably lead to factual disputes about who the actual decisionmaker was, a question that may turn more on de facto influence than on the individual's nominal position. *E.g.*, *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 152 (2000). Petitioner does not indicate whether those disputes would be resolved by the judge or the jury, and does not explain whether on its view a mixed-motive analysis would be permissible if there were direct evidence regarding statements by only one of several decisionmakers involved in a particular action.[48]

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[47] The United States disagrees with this standard, suggesting that evidence would be "direct" if it concerned others who played some role in the decisionmaking process. (U.S. Br. 27 n.5).

[48] These problems are illustrated by *Fields v. Clark University*, 817 F. 2d 931 (1st Cir. 1987), one of the cases cited by Justice O'Connor in *Price Waterhouse* as an example of direct evidence. 490 U.S. at 273-74. The only remark in that case in any way connected with the employment decision in question (the denial of tenure) was made by one of the six members of the sociology department, all of whom subsequently voted against recommending tenure. The department's recommendation was then considered by the "committee on personnel", which in turn voted unanimously to recommend against tenure. The committee's recommendation in turn was forwarded to the actual decisionmaker, the board of trustees. 817 F. 2d at 932.

Second, petitioner maintains that the remark in question must reflect unambiguous bias on the basis of race or gender. (Pet. Br. 41). But in *Price Waterhouse* most of the assertedly stereotyped remarks were made by partners who *supported* Hopkins. And even those were not unambiguously misogynistic. One partner, for example, commented that Hopkins should take "a course at charm school", 490 U.S. at 234, a remark with sexist overtones but one which could have been made about a man. Several partners objected to Hopkins' use of profanity, 490 U.S. at 234, a complaint that might have been but was not necessarily related to her gender. One partner described her as "macho", a remark that could also be made (probably with critical, albeit perhaps somewhat different, meaning) about a man. *Id.* The distinction proposed by petitioner would compel the courts to deal with issues of baffling nuance and complexity.[49] In the instant case, for example, petitioner asks this Court to hold (apparently as a matter of law) that labeling a woman a "bitch" does not reflect any gender-based animus or stereotyping. (Pet. Br. 46-48).

Third, petitioner insists that the decisionmaker's unambiguous remark must be made in connection with the decision at issue.[50] (Pet. Br. 41). If a supervisor stated

[49] For example, in *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F. 3d 572 (1st Cir. 1999), there was testimony that the relevant decisionmaker had explained his actions by remarking "I don't need minorities" and "I don't have to hire you . . . Cape Verdean people." 199 F. 3d at 578-79. The court of appeals agreed that these statements could reasonably have been interpreted "as a discriminatory explanation for DaCosta's action", but held that the remarks were not direct evidence because that was not the only conceivable interpretation. 199 F. 3d at 583.

[50] If that were correct, proof that a decisionmaker constantly referred to African-Americans as "niggers" would not constitute direct

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that "all women are incompetent workers", but did not dismiss a female employee until a few months (or perhaps weeks or days) later, that apparently would not suffice. To implement this limitation, the courts would have to fashion a sort of statute of limitations period for direct evidence, after the expiration of which such evidence could no longer be invoked. In *Reeves*, this Court disapproved the use of just this sort of objection to minimize biased remarks by company officials. 530 U.S. at 152-53.

The United States would go even further. The government asserts that even an unambiguously biased remark made by a decisionmaker at the very moment of dismissal would not be "direct evidence" absent additional proof that the animus was company "policy", rather than mere "personal opinion." (U.S. Br. 27). On this view the standard would (or at least might) not have been met even if Costa had been expressly told "I am firing you because you are a woman." If that is what "direct evidence" means, mixed-motive (i.e., section 703(m)) cases will be, not merely rare, but non-existent.[51]

evidence, unless he did so in specific connection with the action complained of. *See Brown v. East Mississippi Electric Power Ass'n*, 989 F. 2d 858, 861-62 (5th Cir. 1993) (holding such remarks to be direct evidence despite the lack of any connection to the dismissal of the plaintiff.)

[51] The rule proposed by the United States is illustrated by *Heim v. State of Utah*, 8 F. 3d 1541 (10th Cir. 1993). In that case the decisionmaker remarked, referring specifically to plaintiff, "Fucking women, I hate having fucking women in the office." 8 F. 3d at 1546. The court of appeals held that this was not direct evidence because the remark was "on its face a statement of [the decisionmaker's] *personal opinion*." 8 F. 3d at 1547 (emphasis added); *see id.* (remark was merely the decisionmaker's "*private* negative view of women") (emphasis added).

(3) Even if such "direct evidence" were proffered by a plaintiff, that alone might not be sufficient.

There could, of course, be a dispute of fact regarding whether a particular remark had been made, or whether the person who made it was the actual decisionmaker. Would the court have to resolve those factual issues before deciding to give a mixed-motive instruction? Petitioner does not say. And even if the court resolved those factual issues in favor of the plaintiff, would it be necessary to instruct the jury that it could not implement the mixed-motive instruction unless it too reached a similar factual conclusion?

Equally unclear is whether the jury's finding of a section 703(m) violation must be connected with the "direct evidence." Petitioner appears to contend that a mixed-motive analysis would be proper only if the jury were to find, based on the direct evidence alone, that some impermissible consideration had been a motivating factor in the disputed decision. (Pet. Br. 42). This would require the jury to make two separate determinations regarding the defendant's motivation, one based solely on the direct evidence and one based on all of the evidence in the case. To permit such separate determinations, the court would have to specifically identify for the jury which evidence offered by the plaintiff was and was not "direct evidence." This is assuredly an utterly unworkable procedure.

The United States insists that a jury should be given instructions under sections 703(m) and 706(g)(2)(B) in "only those cases where *courts* have a high degree of confidence that the employer's decision was tainted by improper motives." (U.S. Br. 29) (Emphasis added). To have such confidence it would not be sufficient for a judge to conclude that the plaintiff had adduced evidence meeting the "direct evidence" standard; the judge would also have to decide

that he or she *believed* the evidence, and was confident that there was enough such evidence that, weighed against any exculpatory evidence, to demonstrate the "high" probability of the existence of improper motive. That sounds very much like a suggestion that, prior to resolving whether to approve a mixed-motive instruction, the judge would have to find that the plaintiff had by clear, convincing and above all "direct evidence" demonstrated the existence of an impermissible motivating factor. The United States points to nothing in the language of the 1991 Civil Rights Act which authorizes any such procedure, and does not explain how it could possibly be reconciled with the Seventh Amendment.

VI. THE JURY'S FINDINGS OF FACT ARE WELL SUPPORTED BY THE RECORD

The jury in this case found that gender had been a motivating factor in Caesars' decision to fire Costa, and that Caesars would not have taken that action against her if she had been a man. (Pet. App. 88a-89a; J.App. 40-41). "[T]he question of intentional discrimination . . . is a pure question of fact." *Pullman Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982). Such factual findings must be upheld if a reasonable jury could find for the prevailing party on that issue. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 122, 151-54 (2000). In determining the sufficiency of the evidence to support a jury verdict,

> the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. . . . [T]he court should review the record as a whole, [and] must disregard all evidence favorable to the moving party that the jury is not required to believe.

Id. at 150-51.

The district judge who presided over the trial twice rejected motions for judgment as a matter of law. At the conclusion of the trial, the district judge ruled:

> Plaintiff's burden is to show that sex played a motivating part in the decision. I think she's produced evidence to satisfy her burden with respect to that. Defendant's burden is that the decision would have been the same even if sex had played no role, and I think both sides have even thus far, if everybody stopped right now, proved a case for the jury.

(J.App. 16-17).

Following the verdict for Costa, Caesars renewed its request for judgment as a matter of law. The trial judge again concluded that Costa had adduced sufficient evidence to support the jury verdict:

> At trial the evidence showed a pattern of disparate treatment favoring male coworkers over plaintiff in the application of disciplinary standards, allowance of overtime, and in her termination. From this evidence reasonable minds could infer that plaintiff's gender played a motivating part in Caesars conduct towards plaintiff. . . . [T]here was evidence of a pattern of intentional, not merely negligent, discriminatory conduct, by plaintiff's supervisor and others in Caesars management, culminating in plaintiff's termination, which was sufficiently egregious to support an award of punitive damages.

(Pet. App. 73a-74a). The trial judge's assessment of the record, based as it is on his unique familiarity with the complex factual disputes in this case, is entitled to a degree of deference.

We set forth in the Statement of the Facts a summary of the extensive evidence supporting Costa's discrimination claim. The history of discriminatory incidents preceding her dismissal is considerably more extensive than that in *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133 (2000). In a number of important respects male coworkers corroborated Costa's testimony that she had been treated worse than the men at Caesars.[52] Caesars' merits brief, to be sure, sets out evidence which, if credited by the jury, might have led to a verdict in favor of the defendant. (Pet. Br. 2-7). In their closing arguments, counsel for each side attacked the credibility of the opposing party's witnesses.[53] But this conflicting evidence,[54] and the differing inferences which could be drawn from it, were for the jury to resolve. So long as reasonable persons could have agreed to the verdict returned by the jury, the Seventh Amendment does not authorize the courts to set aside that verdict.

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[52] Such testimony, of course, was not legally required. A plaintiff's own testimony regarding events of which he or she has personal knowledge, if credited by the trier of fact, is as probative as any other testimony.

[53] For example, commenting on a defense witness who insisted that certain information would not have altered his decision, counsel for Costa commented, "Give me a break. You and I both know it would change our minds." (Tr. 630). On the other hand, counsel for Caesars attacked the credibility of the male coworkers who testified on behalf of Costa. "But if you listen very carefully, those Teamsters did use the party line, oh, yes, yes, oh, yes, yes, Karen [Hallett] always picked on – always picked on poor Catharina; very low on detail." (Tr. 649).

[54] During his closing argument, counsel for Caesars asserted, "[I]t's really hard to decide a case like this when you have . . . differing stories from the witness stand, but the burden is on her.") (Tr. 653).

CONCLUSION

For the above reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner Desert Palace, Inc., dba Caesars Palace Hotel & Casino is wholly owned by Park Place Entertainment Corporation which is a publicly traded corporation. Park Place Entertainment Corporation is unaware of any publicly traded company that owns 10 percent or more of its stock.

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ARGUMENT

I. Section 107 of the Civil Rights Act of 1991 Is Applicable Only to Mixed-Motive Cases and It Did Not Alter the *Price Waterhouse* Direct Evidence Requirement.

Respondent Costa and amici Lawyers' Committee for Civil Rights Under Law, et al. ("Lawyers' Committee") argue that Section 107 of the Civil Rights Act of 1991 ("CRA 1991"), 42 U.S.C. §§ 2000e-2(m) and 2000e-5(g)(2)(B), applies to all Title VII disparate treatment cases, not just mixed-motive cases. "As the *en banc* court properly held in this case, the Civil Rights Act of 1991 sets 'a motivating factor' as the causation standard for all cases of Title VII disparate treatment discrimination." (Lawyers' Committee Br., p. 9) (emphasis in original). "Section 703(m) is not *limited* to cases in which an employer has acted with multiple motives." (Resp. Br., p. 11) (emphasis in original). Costa goes further and claims that not only does Section 107 of CRA 1991 apply to all Title VII disparate treatment cases, but that this section "does not purport to amend [42 U.S.C. §2000e-2(a)] by clarifying the words 'because of'; to the contrary [42 U.S.C. §2000e-2(m)] is a new and distinct provision which entirely supplants the phrase 'because of' wherever it appears in Title VII." (Resp. Br., pp. 21-22.)

Caesars' position is that Section 107 represents a relatively modest adjustment to Title VII regarding the remedies available in the limited number of Title VII mixed-motive cases. Costa's interpretation of Section 107 effectively

overrules *McDonnell Douglas/Burdine*[1] and relieves Title VII plaintiffs of their burden of proof on causation in virtually every disparate treatment case. A review of the context in which Section 107 of CRA 1991 was enacted and its plain language quickly rebuts Costa's interpretation.

Before *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the employer never carried the burden of proof on causation in Title VII disparate treatment cases. The Court recognized the extraordinary circumstances presented in *Price Waterhouse* that supported a burden-shifting framework separate from the pretext framework established in *McDonnell Douglas/Burdine*. The Court in *Price Waterhouse* for the first time approved a mixed-motive analysis for Title VII disparate treatment cases which in narrow circumstances shifts the burden of proof on causation to the employer. The Court held that a heightened evidentiary showing was required to trigger the mixed-motive analysis. This heightened evidentiary requirement was necessary because of the "strong medicine" of shifting to the employer the burden of proof on causation. *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring). The Court took great pains to recognize the continuing viability and importance of the pretext framework established in *McDonnell Douglas/Burdine*. *Price Waterhouse*, 490 U.S. at 245, 247 (Brennan, J., plurality opinion); *Id.* at 260 (White, J., concurring); *Id.* at 261 (O'Connor, J., concurring); *Id.* at 279-80 (Kennedy, J., dissenting). Before CRA 1991, circuit courts distinguished between the *Price Waterhouse* mixed-motive framework and the *McDonnell Douglas* pretext framework and had adopted

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[1] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

the direct evidence requirement announced in Justice O'Connor's opinion in *Price Waterhouse*.[2]

Against this backdrop, Congress enacted CRA 1991. Section 107 of CRA 1991 codified the *Price Waterhouse* mixed-motive analysis with the exception that after CRA 1991 an employer that prevails on the same-decision defense no longer avoids liability altogether. 42 U.S.C. § 2000e-5(g)(2)(B). CRA 1991 did not alter the distinction between *McDonnell Douglas/Burdine* pretext cases and *Price Waterhouse* mixed-motive cases. CRA 1991 did not repeal the "because of" standard in 42 U.S.C. § 2000e-2(a). Moreover, nothing in the text of CRA 1991 suggests that Congress intended to disturb the heightened evidentiary requirement for triggering the mixed-motive analysis. Contrary to the Ninth Circuit's *en banc* reading of the legislative history of CRA 1991, that history confirms that the remedy issue was the one aspect of *Price Waterhouse* that Congress intended to overturn by enactment of CRA 1991. (Pet. Br., pp. 20-23.) After CRA 1991 and until the Ninth Circuit's decision in this case, circuit courts consistently applied the distinction between pretext and mixed-motive cases and required a heightened evidentiary standard to trigger application of the latter.

The "plain language" arguments raised by Costa and the Lawyers' Committee to support elimination of the distinction between pretext and mixed-motive cases and to eliminate the heightened evidentiary requirement are

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[2] *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568 (2d Cir. 1989); *Randle v. La Salle Telecommunications, Inc.*, 876 F.2d 563, 569-70 (7th Cir. 1989). *See also* cases cited in the Brief for the United States at pp. 27-29.

unavailing. The plain language of Section 107 establishes that it applies only to *Price Waterhouse* mixed-motive cases by providing that an unlawful employment practice is established where "the complaining party demonstrates that [a prohibited factor] was a motivating factor for any employment practice, *even though other factors also motivated this practice*." 42 U.S.C. § 2000e-2(m). (Emphasis added.) This is a description of a *Price Waterhouse* mixed-motive case, and there was no need to include the "other factors" phrase in this section if it was intended to apply to all disparate treatment cases. The "other factors" phrase is clearly a reference to mixed-motive cases, and its inclusion conclusively rebuts the argument that the motivating factor analysis was intended to apply to pretext as well as mixed-motive cases.

Section 107(b), 42 U.S.C. § 2000e-5(g)(2)(B), which limits the types of remedies available in mixed-motive cases, expressly states that this provision applies only to a "claim in which an individual proves a violation under Section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor . . . ." If Section 107(a), 42 U.S.C. §2000e-2(m), were intended to apply to all disparate treatment cases, then Section 107(b) would have been drafted to apply to all cases brought under 42 U.S.C. § 2000e-2(a). The fact that Congress explicitly limited Section 107(b) to apply only to claims under Section 107(a) confirms "that Congress intended to draw a distinction between most disparate-treatment cases against employers (which are brought under 42 U.S.C. § 2000e-2(a)) and a subset of cases in which an individual proves a violation under Section 2000e-2(m)." *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 218 (3d Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001).

Moreover, Section 107(b) cannot by its terms apply in a case brought under 42 U.S.C. § 2000e-2(a) because if a plaintiff proves that a decision was made "because of" an unlawful factor (as opposed to a mixture of unlawful and lawful factors motivating the decision), it would be impossible for a defendant to demonstrate that it "would have taken the same action in the absence of the impermissible motivating factor." Section 107 of CRA 1991 can only be read to apply to mixed-motive cases.[3]

The language of CRA 1991 does not support Costa's contention that Section 107 was enacted to "supplant" the "because of" standard wherever it is found in Title VII. Congress could have amended 42 U.S.C. § 2000e-2(a) and other Title VII sections that include the phrase "because of" and substituted the "motivating factor" language in its place. Congress did not. Nor did Congress overturn or modify the *McDonnell Douglas/Burdine* pretext framework. "It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. See Civil Rights Act of 1991, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonell Douglas* and *Burdine*." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 542 (1993) (Souter, J., dissenting).[4]

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[3] The argument that the term "demonstrates" is defined in 42 U.S.C. §2000e-m as "meets the burdens of production and persuasion" says nothing about the *nature* of the evidence necessary to meet those burdens. (Resp. Br., pp. 12-13.)

[4] After CRA 1991, the Court has reaffirmed and applied the *McDonnell Douglas/Burdine* pretext framework in disparate treatment cases based on circumstantial evidence. *Reeves v.*

The argument that Section 107 applies to all Title VII disparate treatment cases is also rebutted by *Landgraf v. USI Film Products,* 511 U.S. 244, 251 (1994). In a case involving the retroactive application of CRA 1991, the Court noted that Section 107 of CRA 1991 "responds to *Price Waterhouse* [citation omitted] by setting forth standards applicable in 'mixed-motive' cases. . . ." *Id.* at 251.

Costa claims that her interpretation of Section 107 "would not conflict in any way" with the *McDonnell Douglas* pretext framework and that the *McDonnell Douglas* framework concerns a method by which a plaintiff may establish "*motive*" and the Section 107 or *Price Waterhouse* mixed-motive framework is a method "of allocating the burden on *causation*." (Resp. Br., pp.29-30.) (Emphasis in original.) In fact, *McDonnell Douglas* is not merely a method to establish motive, but is a framework for proving causation. *See, e.g., McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (The Court explains that a plaintiff who proves "pretext" under the *McDonnell Douglas* framework proves "but for" causation.)

Lawyers' Committee argues that Section 2000e-2(m) must apply to all Title VII disparate treatment cases or else"absurd results" will occur. (Lawyers' Committee Br., p. 12.) It is not absurd to require a plaintiff in a pretext case to carry the ultimate burden of persuasion, with direct or circumstantial evidence, on the issue whether a challenged decision was made for an unlawful reason *or* for lawful reasons. It is likewise not absurd to require a plaintiff to

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Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

make a heightened evidentiary showing to demonstrate that an unlawful factor was a motivating factor in a decision which was also based on lawful factors, *before the burden of persuasion on causation is shifted* to the employer to prove it would have made the decision absent the unlawful factor. This is the result of maintaining the *McDonnell Douglas/Burdine* pretext framework and the *Price Waterhouse* mixed-motive framework established by the Court. To require a heightened evidentiary showing by a plaintiff in cases where (1) lawful reason(s) are present for an employment action and (2) the burden of proof on causation is shifted to the employer is exactly the balance struck by Justice O'Connor's concurring opinion in *Price Waterhouse*. All circuit courts, except perhaps the Ninth Circuit, recognize the distinctions between pretext and mixed-motive cases, despite enactment of CRA 1991.

II. Justice O'Connor's Concurring Opinion - - Which Requires Direct Evidence To Trigger the Application of the Mixed-Motive Analysis - - Is the Holding of the Court in *Price Waterhouse*.

Costa and the Lawyers' Committee argue that Justice O'Connor's concurring opinion, which requires direct evidence to trigger the application of the mixed-motive analysis, is not the holding in *Price Waterhouse*. (Resp. Br., pp. 23-24; Lawyers' Committee Br., pp. 13-15.) The Lawyers' Committee argues that Justice White's concurring opinion is the holding. (Lawyers' Committee Br., pp. 14-15.) These arguments fail.

The *Price Waterhouse* plurality opinion states that its description of the evidence necessary to trigger the mixed-motive analysis is *not* "meaningfully different" from the direct evidence requirement in Justice O'Connor's concurring

opinion, but further states that a precise description of the requisite evidence is "unnecessary in this case." *Price Waterhouse*, 490 U.S. at 251-52, 250 n.13 (Brennan, J., plurality opinion). While the plurality opinion does not expressly adopt a specific evidentiary standard to trigger the mixed-motive analysis, it implicitly adopts a high standard by agreeing that its description of the requisite evidence is not "meaningfully different" from the heightened evidentiary standard in Justice O'Connor's concurring opinion.

Justice White concurred in the judgment, but his concurring opinion would apply *Mount Healthy* and require a plaintiff to show that "the unlawful motive was a *substantial* factor in the adverse employment action." *Id.* at 259 (White, J., concurring).[5]

Justice O'Connor also concurred in the judgment, but her concurring opinion states that the mixed-motive analysis is triggered only by "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criteria in reaching their decision." *Id.* at 276 (O'Connor, J., concurring) (emphasis added).

The Court in *Marks* provided guidance for determining the holding of the Court in situations like those presented in *Price Waterhouse*. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as

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[5] *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Direct evidence of an unlawful motive - - a written statement from the decisionmakers which identified plaintiff's protected speech as a reason for the adverse job action - - was present in *Mt. Healthy*. *Id.* at 283 n.1.

that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977), *quoting Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). Here, no single rationale on the evidentiary showing necessary to trigger the mixed-motive analysis enjoyed the assent of five Justices. Justice O'Connor's concurring opinion requiring direct evidence is the narrowest ground supporting the judgment of the Court.

Costa misstates Caesars' argument on this point. Costa claims that Caesars urges that Justice O'Connor's concurring opinion is the holding of the Court "because her vote was necessary to constitute a majority in favor of the Court's judgment." (Resp. Br., p. 23.) That is not Caesars' argument. Rather, Justice O'Connor's concurring opinion is the holding of the Court because it is the "narrowest ground" supporting the judgment. Both Costa and the Lawyers' Committee misapply *Marks* and argue that because the plurality opinion and Justice White's concurring opinion did not expressly require direct evidence, Justice O'Connor's opinion is irrelevant. (Resp. Br., pp. 23-24; Lawyers' Committee Br., pp. 14-15.) They both argue that because five Justices supported the judgment without counting Justice O'Connor's concurring opinion (the four-Justice plurality plus Justice White), her opinion can be ignored. (*Id.*) That argument is in conflict with *Marks*, which looks to the position of the Justice who concurs on the "narrowest ground" in cases where, as in *Price Waterhouse*, no single rationale enjoys the assent of five Justices. The plurality opinion expressly adopts no standard; Justice White's concurring opinion states that the unlawful bias must be a substantial factor in the decision; Justice O'Connor's concurring opinion agrees that the unlawful bias must be a substantial factor, but her opinion requires that this demonstration be made through "direct evidence." Costa and

the Lawyers' Committee simply seek to add Justice White's concurring opinion to the four-Justice plurality, rather than Justice O'Connor's narrower concurring opinion, in order to avoid the direct evidence holding.

The statement by Costa that "a total of five Justices (the plurality together with Justice White) agreed that direct evidence was not needed to shift the burden of proof under *Price Waterhouse*" is not true. (Resp. Br., p. 24.) Nowhere in the plurality opinion or in Justice White's concurring opinion is there any reference to direct evidence not being needed. Again, the plurality stated that its description of the evidence required to shift the burden of proof on causation was not "meaningfully different" from Justice O'Connor's direct evidence requirement, and Justice White urged application of *Mt. Healthy*, a case in which direct evidence was present. It *is* true that six Justices (the plurality and Justices O'Connor and White) in *Price Waterhouse* held that the evidence presented by Ann Hopkins was sufficient to shift the burden of proof, and she presented strong, direct evidence that her sex was a motivating factor in the adverse job action.

As argued on page 16 of Caesars' Brief on the Merits, even the *Price Waterhouse* dissent considered Justice O'Connor's concurring opinion regarding the direct evidence requirement the holding of the Court. *Price Waterhouse*, 490 U.S. at 280, 290 (Kennedy, J., dissenting). Costa attempts to dispense with that argument by proclaiming that "it is not unheard of for dissenters to seek to recharacterize the holding of the Court in a manner closer to the minority view." (Resp. Br., p. 27.) The "minority view" in *Price Waterhouse* was that the burden of proof on causation in Title VII disparate treatment cases should not shift to the employer. In recognizing Justice O'Connor's concurring opinion as

controlling, the dissent moves nothing closer to its view that the burden of proof on causation should not shift.[6]

III. Costa's Arguments That Caesars' Proposed Direct Evidence Standard Is "Neither Clear Nor Workable" Are Nothing More Than Disagreements With Decisions of the Court. (Resp. Br., pp. 36-44.)

Costa first complains that Caesars and the United States are urging the Court to:

> create a classification system dividing Title VII discriminatory intent cases into two distinct categories with separate methods of proof and different burdens of proof regarding causation: "mixed-motive" cases and *McDonnell Douglas* cases.

(Resp. Br., p. 36.)

The Court already created the separate *McDonnell-Burdine* pretext framework and the *Price Waterhouse* mixed-motive framework. Caesars urges nothing new on this point. Caesars simply explains that the frameworks established by the Court are appropriate and survived CRA 1991. It is Costa who seeks to supplant the "because of" standard and merge the pretext and mixed-motive frameworks.

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[6] Costa and the Lawyers' Committee also ignore (1) the circuit court decisions specifically applying *Marks* to *Price Waterhouse* and concluding that Justice O'Connor's concurring opinion is the holding of the Court and (2) the great weight of circuit court decisions that have implicitly held that Justice O'Connor's concurring opinion is the holding of the Court. (Pet. Br., pp. 23-24.)

Costa next claims that a "system of categorization under which a judge must determine prior to trial whether a case involves mixed motives would be entirely unworkable." (*Id.* at p. 37.) Caesars does not urge any pre-trial determination, and this issue was also resolved by the Court in *Price Waterhouse* and applied by lower courts. "At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives." *Price Waterhouse*, 490 U.S. at 247 n.12 (Brennan, J., plurality opinion). "Once all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it. If the plaintiff has failed to satisfy the *Price Waterhouse* threshold, the case should be decided on the principles enunciated in *McDonnell Douglas* and *Burdine*, with the plaintiff bearing the burden of persuasion on the ultimate issue whether the employment action was taken because of discrimination. In my view, such a system is both fair and workable. . . ." *Id.* at 278-79 (O'Connor, J., concurring). "Whether a plaintiff has satisfied this evidentiary threshold is a decision for the district court after it has reviewed the evidence. [Citations to *Price Waterhouse* opinions omitted.] If so, the plaintiff is entitled to a mixed motive treatment. If not, the plaintiff must prevail under the standards that apply in pretext cases." *Fuller v. Phipps*, 67 F.3d 1137, 1142-43 (4th Cir. 1995). "[A]n employee may present his case under both theories and the district court must then decide whether one or both theories properly apply at some point in the proceedings prior to instructing the jury." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 781 n.17 (3d Cir. 1994). Trial courts frequently assess the sufficiency of evidence at various stages in a proceeding - - e.g., summary judgment, judgment as a matter of law - - and Costa offers no reasonable argument why it is not "fair and workable" for a

trial court to determine if a plaintiff has sufficient evidence to trigger a mixed-motive analysis before a jury is instructed.

Costa argues that testimony from a decisionmaker to a plaintiff that "I did not hire you because you are white" is not direct evidence and therefore the application of the mixed-motive analysis "will be rare." (Resp. Br., pp. 39-40.) Caesars disagrees that such evidence is not direct evidence under *Price Waterhouse* or any reasonable standard, and Caesars does not contend that such evidence is insufficient under the standard it proposes. If, however, a plaintiff has such strong, direct evidence that a decision was made for an unlawful reason, a plaintiff would not need to invoke the mixed-motive analysis. Rather, such a plaintiff could prove discrimination "because of" the unlawful factor and establish a violation under 42 U.S.C. §2000e-2(a). Such evidence would not require the use of the *McDonnell Douglas* circumstantial evidence framework,[7] nor would such a plaintiff need to invoke the mixed-motive analysis which could conceivably allow the employer an opportunity to avoid damages under 42 U.S.C. §2000e-5(g)(2)(B).[8]

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[7] *See Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

[8] Costa's reliance on Judge Tjoflat's decision in *Wright v. Southland Corp*, 187 F.3d 1287 (11th Cir. 1999) for this analysis of direct evidence is misplaced. (Resp. Br., pp. 39-40 n.45.) Judge Tjoflat's analysis is "mere obiter dictum. . . ." *Copley v. Bax Global, Inc.*, 80 F. Supp. 2d 1342, 1348 (S.D. Fla. 2000). "Judge Tjoflat's opinion, however, is not the law of the Eleventh Circuit. Neither of the other two judges on the panel concurred in the opinion, and subsequent decisions have not followed it." *Bates v. The Variable Annuity Life Ins. Co.*, 200 F. Supp. 2d 1375, 1381 n.3 (N.D. Ga. 2002).

Whether or not the application of the mixed-motive analysis "will be rare" is not a reason to refuse to follow the *Price Waterhouse* direct evidence standard. Justice O'Connor's concurring opinion acknowledged that direct evidence is "hard to come by". *Price Waterhouse*, 490 U.S. at 271 (O'Connor, J., concurring). (*See also* Pet. Br., p. 11 for other cases acknowledging that direct evidence of intentional discrimination is relatively rare.) The purpose of a heightened evidentiary standard in mixed-motive cases is to ensure that the "strong medicine" of shifting the burden of proof on causation will only occur in a narrow category of cases. To do otherwise will destroy the careful *McDonnell Douglas/Burdine* framework established by the Court.

Finally, the claim by Costa that the direct evidence standard proposed by Caesars limits its application to statements (1) by "decisionmakers" (2) that reflect "unambiguous bias"[9], (3) "made in connection with the decision at issue" is nothing more than an argument that Justice O'Connor's concurring opinion be rejected. (Resp. Br., pp. 43-44.) Justice O'Connor's concurring opinion states:

> Thus, stray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.

Price Waterhouse, 490 U.S. at 277 (O'Connor, J., concurring).

[9] Caesars actually proposes that the statements "directly reflect the alleged animus." (Pet. Br., p. 41.)

The direct evidence standard proposed by Caesars is consistent with the holding and facts in *Price Waterhouse*. It provides a workable test for application by the trial judge who must act as a gatekeeper to determine if a plaintiff's evidence is sufficient to trigger the mixed-motive analysis and shift the burden of proof on causation to the employer. Costa's view that no heightened evidentiary standard is required would effectively merge the pretext and mixed-motive frameworks and repeal the "because of" standard in 42 U.S.C. § 2000e-2(a). This view is contrary to the Court's prior rulings and Congressional intent as reflected in the plain language of CRA 1991 and its legislative history.

IV. Caesars Objected To the Mixed-Motive Jury Instruction, and the Trial Court's Decision to Give That Instruction Was Not Harmless Error.

Costa and amicus Ann B. Hopkins contend that the at-issue mixed-motive jury instruction "benefitted" Caesars and was to Caesars' "advantage" because it gave Caesars a chance to avoid certain damages. (Resp. Br., p. 19; Hopkins Br., p. 25.) The giving of the mixed-motive instruction without direct evidence that Costa's gender was a motivating factor in her discharge did not "benefit" or "advantage" Caesars, and it was in error. At trial, Caesars objected to the mixed-motive instruction which began with the phrase "You have heard evidence that the defendant's treatment of the plaintiff was motivated by plaintiff's sex . . ." and then shifted to Caesars the burden of proof on causation. (J.A. 16-17 [Tr. 460-61];

J.A. 24-25; Pet. App. 58a.) The Ninth Circuit panel recognized that this error was not harmless because it improperly shifted the burden of proof on causation to Caesars. (Pet. App. 65a-66a.)

This case presents a garden variety, circumstantial evidence Title VII pretext case in which "*either* a legitimate [altercation with co-worker against a background of prior discipline] *or* an illegitimate [sex discrimination] set of considerations led to the challenged decision." *Price Waterhouse*, 490 U.S. at 247 (Brennan, J., plurality opinion).[10] As such, Costa should have retained the burden of proof on causation.

V. Costa's Statement of the Facts Materially Misstates the Record.

Costa's factual statement contains numerous conclusory and erroneous points not supported by the

[10] Amicus Ann B. Hopkins appears to agree that this was not a mixed-motive case: "On this record, it is not clear whether a dual motivation instruction was appropriate. . . . Costa said that she was fired because of her sex, and Caesars said it was because of her disciplinary record. This would seem to pose the type of either-or choice characteristic of *Burdine's* pretext model, which is unsuitable for dual motivation treatment." (Hopkins Br., p. 30.) Nowhere in her brief does Costa argue that she presented direct evidence of sex discrimination. In fact, Costa acknowledges that "Caesars' Merits Brief, to be sure, sets out evidence which, if credited by the jury, might have led to a verdict in favor of the Defendant." (Resp. Br., p. 49.)

record.[11] Many of the points are not germane to the issues in the case, but Caesars does call to the Court's attention two areas where Costa makes material misstatements.[12]

A. The overtime comment did not reference gender.

Costa's brief alleges that Costa was once not given an overtime assignment and that her supervisor said the reason her co-worker received the assignment was because "he's a man and has a family to support." (Resp. Br., p. 4.) In her direct testimony at trial, Costa inferred that the supervisor referenced the gender of the co-worker in the statement. However, under cross-examination, Costa recanted and admitted that the supervisor never referenced the co-worker's

[11] Although short of an explicit statement, Costa does by innuendo suggest that by terminating her "only" three months after she filed her EEOC charge that Caesars illegally retaliated against her. (Resp. Br., p. 6.) Costa's retaliation claim was actually dismissed by the district court on summary judgment. Minute Order, October 16, 1997. (District Court Docket No. 43.)

[12] Costa's amicus National Employment Lawyer's Association ("NELA") also omits material facts from its brief. In an effort to suggest that plaintiffs are losing more cases, NELA cites to the BJS Special Report, stating that "for civil rights cases, dismissals increased from 66% in 1990 to 71% in 1998." (NELA Br., p. 11.) NELA, however, omits the explanation given by BJS for the rise in dismissals. According to the special report, this 5% increase "was driven by the rise in the proportion of out of court settlements - increasing from 31% to 35% between 1990 and 1998, as well as voluntary dismissals - increasing from 8% to 13%." NELA's interpretation of the term "dismissal" is misleading because it suggests more and more plaintiffs are losing their discriminatory claims.

gender or used the word "man" in reference to why the co-worker received the assignment:

> Q. [Counsel for Caesars] And he said that Dudenake was getting the overtime because he had a family to support?
> A. [Costa] That's what was said at the time.
> Q. He didn't say anything about Mr. Dudenake being a man in that conversation?
> A. I took it as such.
> Q. But he didn't say that?
> A. A man that has a family to support.
> Q. You took it that way, but he didn't say the word "man," did he?
> A. He didn't have to say the word "man" because people can say a lot of things. The inference was there.

J.A.9 [Costa Tr. 249]; Pet. App. 63a.

B. Gerber admitted that Costa pushed him in the elevator.

Costa, in an attempt to attack Caesars' decision to terminate her for participating in an altercation with a co-worker, states that there is no evidence that she pushed Herbert Gerber in the elevator. Costa states that Gerber gave conflicting accounts of whether Costa had shoved or hit him, "*ultimately* admitting she had done neither."(Resp. Br., pp.6-7.) (Emphasis added.) Gerber's "ultimate" trial testimony on this point follows:

> Q. [Counsel for Caesars] Is your memory now refreshed as to what happened in that elevator?
> A. [Herbert Gerber] Yes.
> Q. Did Ms. Costa push you in that elevator?
> A. Yes.

Gerber Tr. 584.[13]

CONCLUSION

Costa and her amici invite the Court to repeal the "because of" standard of causation in 42 U.S.C. § 2000e-2(a) and everywhere else it is found in Title VII. In its place Costa requests that the Court amend Title VII and apply the "motivating factor" standard of causation applicable only in mixed-motive cases to *all* Title VII disparate treatment cases. That result would shift the burden of proof on causation to the employer in virtually every Title VII disparate treatment case and effectively overrule *McDonnell Douglas/Burdine*.

Congress did not repeal 42 U.S.C. §2000e-2(a) when it codified the *Price Waterhouse* mixed-motive analysis in Section 107 of CRA 1991. Congress did not eliminate the distinction between pretext and mixed-motive cases when it enacted Section 107. Section 107 on its face applies only to

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[13] Costa also states in her factual summary that it would be improbable that she would have started a physical altercation with Gerber because she is "a woman of average height and weight" and would have been "no match for the taller, heavy set Gerber." (Resp. Br., p.7.) Other than Costa's testimony regarding her dress size at various times in her life, there is no evidence in the record to indicate whether she was of average height and weight.

mixed-motive cases, as the Court recognized in *Landgraf*. Congress also did not intend to disturb the heightened evidentiary requirement necessary to trigger the mixed-motive analysis. Rather, the one aspect changed by CRA 1991 involves the remedies available if an employer prevails on the same-decision defense.

Caesars requests that the Ninth Circuit *en banc* opinion be vacated, and that the relief requested in its Brief on the Merits be granted.

Respectfully submitted.

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IN THE

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Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council and the Chamber of Commerce of the United States respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, Desert Palace, Inc., dba Caesars Palace Hotel & Casino.

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC" or the "Council") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 340 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and many of the Chamber's members are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, and other equal employment statutes and regulations. As employers, and as potential defendants to claims asserted under these laws, members of EEAC and the Chamber have a substantial interest in the issue presented in this case, *i.e.*, whether there must be direct evidence of discrimination in Title VII cases to warrant the "mixed-motives" analysis this Court established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

EEAC and the Chamber seek to assist this Court by highlighting the impact its decision may have beyond the

immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of this Court relevant matters that the parties have not raised. Because of their experience in these matters, EEAC and the Chamber are well situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Respondent Catharina F. Costa worked in a warehouse for Desert Palace, Inc., dba Caesars Palace Hotel & Casino ("Caesars"). *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 844 (9th Cir. 2002). During her employment, Costa was disciplined several times for engaging in inappropriate conduct and using profanity at work. *Id.* at 844-45. She was terminated by Caesars in 1994 for a physical altercation she had with a co-worker. *Id.* at 846.

Costa sued Caesars, alleging among other things that her sex was a motivating factor in her termination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* At trial, the U.S. District Court for the District of Nevada gave the jury a "mixed-motives" instruction as follows:

> You have heard evidence that the defendant's treatment of plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence

> that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Id. at 858. The jury returned a verdict in favor of Costa and awarded her back pay and damages. *Id.* at 846.

On appeal, the U.S. Court of Appeals for the Ninth Circuit vacated the judgment based on this Court's plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and Justice O'Connor's concurrence. The appeals court held that the district court had erred by giving the jury the mixed-motives instruction without "direct and substantial evidence of discriminatory animus," and that the error was not harmless. *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 889 (9th Cir.), *vacated*, 274 F.3d 1306 (9th Cir. 2001).

On *en banc* rehearing, the Ninth Circuit overruled the panel in a 7-4 decision, holding that the district court's mixed-motives jury instruction was proper. 299 F.3d at 859. The *en banc* majority held that the 1991 Civil Rights Act overruled *Price Waterhouse* entirely, thereby allowing a Title VII plaintiff to use either direct or circumstantial evidence to show that a protected characteristic played "a motivating factor" in an adverse employment action. The dissenting judges observed that the majority holding "puts our circuit in conflict with almost all others." *Id.* at 866. (Gould, Kozinski, Fernandez & Kleinfeld, JJ., dissenting).

This Court granted certiorari to address the conflict between the Ninth Circuit's decision and those of the other circuit courts of appeals over what type of evidence Title VII plaintiffs must show in order for a district court to treat their case as one involving mixed-motives under *Price Waterhouse v. Hopkins*.

SUMMARY OF ARGUMENT

A mixed-motives analysis is appropriate only when the plaintiff has presented direct evidence of discrimination, *i.e.* that a decisionmaker either referred openly to a protected

characteristic to explain a challenged employment decision or relied on a facially discriminatory policy. This standard is based on the Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Since no opinion garnered the support of a majority of Justices in *Price Waterhouse*, Justice O'Connor's concurring opinion states this Court's holding. *Marks v. United States*, 430 U.S. 188, 193 (1977). Therefore, *Price Waterhouse* requires direct evidence that a protected characteristic played a substantial role in an employment action for a mixed-motives analysis to apply. Neither the plain language of the 1991 Civil Rights Act (CRA), P.L. 102-166, nor its legislative history indicates that Congress intended to alter this standard.

This Court should limit mixed-motives analysis only to situations where a decisionmaker openly referred to a protected characteristic to explain a challenged employment decision or relied on a facially discriminatory policy. Justice O'Connor's characterization of the plaintiff's proof in *Price Waterhouse* as direct evidence and this Court's prior narrow interpretation of direct evidence both support this standard. In *Price Waterhouse*, the plaintiff was told essentially that she did not make partner because she did not conform to gender stereotypes. Likewise, in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), a precursor to *Price Waterhouse*, a school superintendent said he would not rehire the plaintiff because the plaintiff had talked to a radio station about a controversial school policy. In both cases, the decisionmaker's open reference to a protected characteristic or activity to explain the adverse action was direct evidence of discrimination. By allowing respondent to use a mixed-motives analysis without direct evidence of discrimination, the Ninth Circuit erred and must be reversed.

Allowing the Ninth Circuit's decision to stand would prejudice employers severely by adding significant hurdles for them to overcome when defending against employment dis-

crimination claims. The decision below would turn every discrimination claim into a mixed-motives case, shifting the burden to the employer in every instance to prove its employment action was based on legitimate criteria. Employers would have to prove their innocence, even if the plaintiff presented only circumstantial evidence of discrimination. The Ninth Circuit's ruling thus overrides the proof scheme this Court developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for use when there is no direct evidence of discrimination. At the same time, mixed-motives treatment significantly undermines the ability of employers to defend against discrimination claims.

ARGUMENT

A MIXED-MOTIVES ANALYSIS IS APPROPRIATE ONLY WHEN THERE IS EVIDENCE THAT A DECISIONMAKER OPENLY REFERRED TO A PROTECTED CHARACTERISTIC TO EXPLAIN A CHALLENGED EMPLOYMENT DECISION OR RELIED ON A FACIALLY DISCRIMINATORY POLICY

I. THIS COURT'S HOLDING IN *PRICE WATERHOUSE*, A STANDARD THE 1991 CIVIL RIGHTS ACT DID NOT ALTER, AND PRIOR NARROW INTERPRETATION OF DIRECT EVIDENCE SUPPORT LIMITING MIXED-MOTIVES ANALYSIS ONLY TO SITUATIONS WHERE A DECISIONMAKER OPENLY REFERRED TO A PROTECTED CHARACTERISTIC TO EXPLAIN A CHALLENGED EMPLOYMENT DECISION OR RELIED ON A FACIALLY DISCRIMINATORY POLICY

A. Justice O'Connor's Concurring Opinion in *Price Waterhouse v. Hopkins* Requiring Direct Evidence That a Protected Characteristic Played a Substantial Role in an Employment Action for a Mixed-Motives Analysis States This Court's Holding

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against an employee or applicant "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Recognizing that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), so that direct evidence is often unavailable, this Court has developed "a sensible, orderly way to evaluate the evidence in light of

common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

This Court established the now-familiar method of proof to establish intentional discrimination using circumstantial evidence in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To establish a prima facie case of discrimination, a plaintiff must show (1) he was a member of a protected class; (2) he applied for and was qualified for a job for which the employer was seeking applications; (3) despite his qualifications, he was rejected; and (4) after his rejection, the position remained open, and the employer continued to seek applicants with his qualifications. *Id.* at 802 (footnote omitted). The burden to establish a prima facie case is not onerous, yet it "creates a presumption that the employer unlawfully discriminated against the employee." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employment decision. *McDonnell Douglas*, 411 U.S. at 802. If the employer succeeds, the presumption of discrimination drops from the case. *Burdine*, 450 U.S. at 255 n.10. At this point, the burden shifts back to the plaintiff to show the proffered reason was merely a pretext for discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 508 (1993). If the plaintiff cannot make this showing, he has failed to establish a violation of Title VII. *McDonnell Douglas*, 411 U.S. at 807.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), this Court established another way of proving intentional discrimination where an adverse employment decision is based on a mixture of both legitimate and illegitimate motives. In that case, the plaintiff showed that her employer, an accounting firm, did not make her a partner based at least in part on its perception that she did not conform to the

stereotype of how a woman should act. In particular, the plaintiff was told she should "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'" to improve her chances for partnership. *Id.* at 235 (citation omitted). Her employer argued that the plaintiff was passed over because of problems with her interpersonal skills. *Id.* at 236.

A plurality of four Justices ruled that where a plaintiff proves that gender played "a motivating part" in an employment decision, along with legitimate factors, the plaintiff has shown that the decision was "because of" her sex in violation of Title VII. *Id.* at 250. The employer still can avoid liability, but only if it proves that it would have made the same decision without considering the protected characteristic. *Id* This method of proof is known as a "mixed-motives" analysis. *Id.* at 246.

The plurality distinguished between mixed-motives cases and pretext cases, which are analyzed under the *McDonnell Douglas* paradigm. According to the plurality, the pretext analysis presupposes that *either* a legitimate or illegitimate reason caused an adverse employment decision by asking whether the defendant's reason is the "true" one. *Id.* at 247. Under the *McDonnell Douglas* test, the plaintiff retains at all times the burden of persuading the fact finder that intentional discrimination occurred. *Burdine*, 250 U.S. at 253. In contrast, the mixed-motives analysis recognizes the comparatively rare situation in which there actually is eyewitness evidence of discrimination, yet the employer contends that it would have taken the same employment action in any event. *Price Waterhouse*, 490 U.S. at 247. Once the plaintiff persuades the trier of fact that an illegitimate factor actually was considered, the burden of persuasion shifts to the employer to prove that it would have reached the same decision based solely on legitimate factors. *Id.* at 246. The plurality characterized the employer's burden at this stage as

"an affirmative defense." *Id.* The plurality expressly declined to identify, however, "which specific facts, 'standing alone' would or would not establish a plaintiff's case," explaining that to do so was "unnecessary in this case." *Id.* at 252.

Justices White and O'Connor each wrote a separate opinion concurring in the judgment without joining the plurality opinion. Justice White disagreed with the plurality's requirement that the employer must provide objective evidence that it would have reached the same result absent the discriminatory factor. In his view, employers should not be restricted to objective evidence to make this showing. *Id.* at 261 (White, J., concurring).

Justice O'Connor wrote separately to explain her view on "when and how the strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation should be administered." *Id.* at 262 (O'Connor, J., concurring). In Justice O'Connor's view, only "*direct evidence* that an illegitimate criterion was a substantial factor in the decision" would justify shifting the burden of proof to the defendant under a mixed-motives analysis. The defendant then must prove that it would have reached the same decision based on wholly legitimate reasons, without considering the protected characteristic. *Id.* at 276 (emphasis added). If the defendant succeeds, then Justice O'Connor agreed with the plurality that it had not discriminated "because of" a protected characteristic.

According to Justice O'Connor, mixed-motives cases appropriately require the employer to assume the heightened burden of refuting discrimination. While the prima facie case under *McDonnell Douglas* may be indicative of discrimination, it does not amount to proof of "the evil[] Congress sought to eradicate from the employment setting." *Id.* at 275. Therefore, the defendant is entitled to a presumption that it acted in good faith when confronted with only circumstantial

evidence of discrimination, and should not have to prove that it acted lawfully. *See id.* at 266. In contrast, direct evidence of discrimination does not entitle the employer to the same presumption that it acted in good faith. Instead, the employer must justify its decision on legitimate criteria. *Id.* at 271.

Without an opinion supported by a majority of the Justices, Justice O'Connor's concurring opinion states the holding of this Court in *Price Waterhouse*. In *Marks v. United States*, 430 U.S. 188, 193 (1977), this Court instructed that when there is no clear majority opinion, "the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (citation omitted). In *Price Waterhouse*, neither the plurality opinion nor Justice White addressed what type of evidence would be sufficient to shift the burden of persuasion to the employer to prove that it would have reached the same decision absent consideration of the discriminatory factor. Justice O'Connor's concurrence requiring direct evidence as a prerequisite for the shift thus is the narrowest ground on which a majority of the Justices agreed. Therefore, her concurring opinion states the holding of this Court.

In addition, Justice Kennedy's dissent, which the Chief Justice and Justice Scalia joined, specifically uses Justice O'Connor's words to describe the Court's holding. "The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision. *Ante*, at 1804-1805 (opinion of O'CONNOR, J.)." 490 U.S. at 280 (Kennedy, J., dissenting).

B. This Court Should Limit Mixed-Motives Analysis Only to Situations Where There Is Evidence a Decisionmaker Openly Referred to a Protected Characteristic To Explain a Challenged Employment Decision or Relied on a Facially Discriminatory Policy

1. Justice O'Connor used a narrow interpretation of direct evidence in *Price Waterhouse*

Justice O'Connor did not explicitly define in *Price Waterhouse* what type of proof would constitute "direct evidence that an illegitimate criterion was a substantial factor in the decision," 490 U.S. at 276 (O'Connor, J., concurring), so as to shift the burden of proof to the defendant to justify its decision on legitimate grounds. Nevertheless, her conclusion that the plaintiff in *Price Waterhouse* had satisfied this evidentiary threshold shows that evidence that a decisionmaker explicitly referred to a protected characteristic to explain a challenged employment action will suffice for this purpose.

In *Price Waterhouse*, the plaintiff produced evidence that several evaluators cited her failure to conform to certain gender stereotypes as a reason why she should not become a partner, that the decisionmakers gave these evaluations "great weight," and that the partner who explained to the plaintiff why she did not make partner told her she could increase her chances of partnership if she were to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'" *Id.* at 272 (citation omitted). To Justice O'Connor, this evidence conveyed that the rejection was because of the plaintiff's gender just as clearly as if "she was *told* by one of those privy to the decisionmaking process that her gender was a major reason for the rejection of her partnership bid." *Id.* at 273. The overt "advice" that the plaintiff should act more like a woman to improve her partnership prospects thus directly connected her

gender to the adverse employment action, warranting the "strong medicine of requiring the employer to bear the burden of persuasion on the issue of causation . . . ." *Id.* at 262.

In contrast, Justice O'Connor said that stray remarks in the workplace, statements made by nondecisionmakers, statements made by decisionmakers that are unrelated to the challenged employment decision, or evidence of sex stereotyping are not sufficient to treat a case as involving mixed-motives. *Id.* at 277. Otherwise, every reference to a protected characteristic would turn into direct evidence of discrimination. Justice O'Connor recognized the problem with such a standard:

> Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of sex."

Id. The Ninth Circuit's reliance on exactly the type of evidence Justice O'Connor dismissed as insufficient to warrant a mixed-motives analysis thus requires reversal.

2. The Court's prior decisions limit direct evidence to situations involving direct consideration of a protected characteristic

Justice O'Connor was not writing on a clean slate when she described the plaintiff's proof as direct evidence in *Price Waterhouse*. The standard she adopted follows logically from this Court's decision in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977), a mixed-motives case involving a constitutional violation. In that case, a teacher, who was not rehired after he alerted a local radio station to a

controversial school policy, sued the school district for violating his right to free speech under the First Amendment. The Court found that a letter from the school superintendent to the plaintiff explaining that he would not be rehired because he had spoken to a local radio station was direct evidence that his protected speech was a "motivating factor" in the adverse decision. *Id.* at 282-83. This evidence was sufficient to shift the burden to the school district to prove by a preponderance of the evidence that it would not have rehired the teacher even absent the protected conduct. *Id.* at 287. The Court's decision in *Mount Healthy* thus supports Justice O'Connor's conclusion that a decisionmaker's open reference to a protected factor to explain an employment decision was direct evidence in *Price Waterhouse*.

Justice O'Connor's standard for direct evidence in *Price Waterhouse* also is consistent with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which she cited as an example of direct evidence. 490 U.S. at 271-72 (O'Connor, J., concurring). In *Trans World Airlines*, the Court held that a company transfer policy that limited a disqualified captain's transfer options based on his age was discriminatory on its face. 469 U.S. at 121. The direct evidence of age discrimination in the company policy thus rendered the *McDonnell Douglas* test inapplicable, the Court said. *Id.*

Mount Healthy and *Trans World Airlines* thus indicate that an admission by a decisionmaker that he rejected the plaintiff because she was a woman would constitute direct evidence to warrant mixed-motives treatment. Likewise, evidence that a decisionmaker said a female candidate would have stood a better chance at obtaining the job if she were a man, or relied on a facially discriminatory policy that limits hiring to only men, also probably would be enough to shift the burden of persuasion to the employer to show that it did not discriminate. Respondent's failure to produce any comparable

direct evidence of discrimination in the instant case thus warrants reversal of the Ninth Circuit's decision to treat her case as involving mixed-motives.

3. The decision below would make the *McDonnell Douglas* line of cases superfluous

This Court has developed different proof schemes to distinguish between discrimination claims based on direct evidence of unlawful bias versus those resting solely on circumstantial evidence. *Price Waterhouse*, 490 U.S. at 246-47. "[T]he entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." 490 U.S. at 271 (O'Connor, J., concurring). The *McDonnell Douglas* test does not even apply when a plaintiff has direct evidence of discrimination. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977). Turning *every* discrimination claim into a mixed-motives case would eliminate this careful distinction and unfairly require employers to prove they acted lawfully in all cases.

The Third Circuit cautioned against this outcome:

> Such a result would merge the two different theories, mixed-motives and pretext, into one cause of action. Every pretext case would then require a mixed-motives instruction and that instruction would shift to the employer the production and persuasion burdens of negating any causal connection between the employer's actions and illegal discrimination instead of requiring the employee to show pretext and to persuade the factfinder that illegal discrimination was the legal cause of action against her . . . the Supreme Court has taken great pains to differentiate between the two theories.

Hook v. Ernst & Young, 28 F.3d 366, 374-75 (3d Cir. 1994) (citation omitted). Likewise, the First Circuit warned that "this mixed-motive approach, uncabined, has the potential to

swallow whole the traditional *McDonnell Douglas* analysis." *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999).

C. The 1991 Civil Rights Act Left Intact This Court's Holding in *Price Waterhouse* That Direct Evidence Is Necessary for a Mixed-Motives Analysis

1. The Civil Rights Act does not refer to the type or quantity of evidence necessary to shift the burden of persuasion to the defendant in a mixed-motives case

Section 107 of the Civil Rights Act of 1991 ("CRA"), P.L. 102-166, superseded only selected parts of this Court's holding in *Price Waterhouse* that an employer was not liable for discrimination *at all* if it could show that it would have reached the same decision without considering a protected characteristic. 490 U.S. at 258. Section 107(a) states: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Section 107(b) makes an employer liable for declaratory and injunctive relief, and attorney's fees and costs, but not damages or reinstatement if it can show that it would have taken the same action despite the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B).

It is well-settled that, when construing statutory provisions, courts must look first to the plain meaning of the statutory language. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). For, as this Court has stated repeatedly, the "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54

(1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The CRA did not displace *Price Waterhouse's* common law requirement for direct evidence to warrant a mixed-motives analysis. Section 107 is completely silent as to what type of evidence is necessary to shift the burden of persuasion from the plaintiff to the defendant in a mixed-motives case. A narrow interpretation of the scope of the CRA's changes is thus warranted, because "[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879). The Ninth Circuit thus erred by interpreting section 107 more broadly to overrule this Court's entire holding in *Price Waterhouse* than the plain language of the statute justifies, and must be reversed.

In addition, several federal circuit courts also have agreed that section 107 of the CRA replaced only that portion of the *Price Waterhouse* decision that an employer was not liable for discrimination at all if it could show it would have taken the same action without considering the discriminatory motive. *See, e.g., Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir. 1999); *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997).

Therefore, the Court's holding in *Price Waterhouse* requiring direct evidence for mixed-motives treatment remains good law after the CRA and warrants reversal of the Ninth Circuit's contrary holding.

2. The Civil Rights Act's legislative history shows Congress did not intend to supersede the requirement for direct evidence to proceed under a mixed-motives analysis

Should the Court delve beyond the plain language of section 107, the CRA's legislative history also indicates that Congress did not intend to supersede the entire ruling in *Price Waterhouse*. Instead, Congress targeted for change only the Court's conclusion that an employer would not be liable for discrimination at all, if it could show it would have reached the same decision without considering the impermissible factor. A section-by-section analysis of the legislation by Senator Dole described the CRA's change to Title VII as "allow[ing] the employer to be held liable if discrimination was a motivating factor in causing the harm suffered by the complainant . . . [but if] it would have taken the same employment action absent consideration of race, sex, color, religion, or national origin, the complainant is not entitled to reinstatement, backpay or damages." 137 Cong. Rec. S15,476 (daily ed. Oct. 30, 1991).[2]

In addition, the report from the House Committee on Education and Labor on the 1990 version of the CRA supports a limited scope of the final CRA. The 1990 version contained virtually the same language regarding mixed-motives cases as the 1991 law. The House report focused solely on the need to replace the part of *Price Waterhouse* holding that employers could avoid liability entirely if they could show that they would have reached the same decision without considering the impermissible factor. H.R. Rep.

[2] President George Bush issued a statement upon signing the CRA instructing that Senator Dole's analysis would be treated as "authoritative interpretive guidance" on the meaning of the statute. Statement By The President (Nov. 21, 1991), *reprinted in* Employment Policy Found., *The Civil Rights Act of 1991 Legislative History*, vol. II-1991 (1992), at 223-34.

No. 102-40, pt. 1, at 45-48 (1991). In fact, the committee specifically clarified that the proposed legislation did not affect two other holdings in *Price Waterhouse* regarding the use of sex stereotyping to prove gender discrimination and the preponderance of the evidence standard for employers. *Id.* at 45. Thus, the CRA's legislative history shows that the statute did not alter *Price Waterhouse's* requirement that a plaintiff must show direct evidence to proceed under a mixed-motives analysis.

II. ALLOWING THE NINTH CIRCUIT'S DECISION TO STAND WOULD SEVERELY COMPROMISE AN EMPLOYER'S ABILITY TO DEFEND AGAINST DISCRIMINATION CLAIMS

A. The Decision Below Would Turn Every Discrimination Claim Into a Mixed-Motives Case, Shifting the Burden of Proof to the Employer Every Time

The Ninth Circuit's decision gives plaintiffs the ability to turn even garden variety discrimination claims into mixed-motives cases, shifting the burden of proof to the employer every time. Even plaintiffs with only circumstantial evidence of discrimination will be able to bypass entirely the *McDonnell Douglas* test in favor of the higher burden a mixed-motives analysis places on employers. The absence of eyewitness evidence of discrimination, which led this Court to develop an alternative proof scheme in *McDonnell Douglas*, no longer will determine the employer's burden of proof. Instead, the decision below significantly ratchets up the employer's burden of proof in *every case* to prove lawful activity. The Ninth Circuit's ruling thus gives plaintiffs not only a second "bite at the apple" to convince the trier of fact that intentional discrimination occurred, it allows the plaintiffs to swallow the apple whole.

Enabling plaintiffs unilaterally to transform every pretext case to a mixed-motives one significantly burdens employers by complicating their defense immeasurably. A mixed-motives instruction, as Justice O'Connor recognized, 490 U.S. at 262 (O'Connor, J., concurring), takes the drastic step of shifting the burden to employers to *prove* affirmatively that they would have acted the same way in any event, not just articulate a legitimate, nondiscriminatory reason for their action under the *McDonnell Douglas* standard. Not surprisingly, a Justice Department study revealed that plaintiffs had won almost 80 percent of the mixed-motives cases after the *Price Waterhouse* decision. *See* H.R. Rep. No. 102-40, pt. 1, at 157-58 (1991) (minority views). Therefore, maintaining "the distinction [between mixed motives and pretext cases] is critical, because plaintiffs enjoy more favorable standards of liability in mixed-motives cases . . . ." *Fuller v. Phipps*, 67 F.3d 1137, 1141 (4th Cir. 1995).

The prospect of turning every employment discrimination claim into a mixed-motives case is especially problematic because employment decisions often provide fertile grounds for discrimination claims. Employment decisions frequently rely on subjective criteria, which may encourage a plaintiff to claim that a protected characteristic was *a* motivating factor, as opposed to *the* motivation. As one commentator observed:

> [e]mployment decisions . . . are almost always mixed-motive decisions turning on many factors. While responsible employers will take steps to assure or encourage lawful motivation by participating individuals, it will often be possible for an aggrieved employee or applicant to find someone whose input into the process was in some way motivated by an impermissible factor—a much lighter burden than demonstrating that the forbidden ground of decision was a determining factor. There is little cost in going forward with a Title VII case if the existence of even one unlawful contributing motivation may assure the employer's minimum liability. Summary judgment will be less frequent because the plaintiff's threshold burden is so light.

David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991*, SF41 ALI-ABA Course of Study 391, 432 (Mar. 1, 2001) (emphasis omitted). By improperly shifting the burden of proof to the employer in virtually every discrimination case, the Ninth Circuit's decision inflates significantly the plaintiff's chances of winning even a weak discrimination claim.

Reserving mixed-motives treatment for cases with direct evidence of discrimination will encourage employers to be vigilant in preventing harm, a primary goal of Title VII. This standard will prompt employers to develop early warning programs to monitor the workplace for discrimination to avoid situations involving direct evidence, which would trigger the higher burden. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1999). Otherwise, forcing employers to prove that they acted lawfully, regardless of whether the plaintiff has direct or only circumstantial evidence of discrimination, provides less incentive for employers to make sure decisions are not inappropriately based on protected factors. If employers will face this higher burden no matter how hard they try to make sure decisionmakers act lawfully, or how well they succeed, then they will have less incentive to develop procedures to scrutinize employment decisions carefully.

In addition, the Ninth Circuit's relaxed standard for mixed-motives cases would encourage frivolous claims, which also frustrate Title VII's goal of avoiding harm. Frivolous mixed-motives claims divert employers' attention and resources away from developing proactive approaches against discrimination:

> [S]ince a large portion of . . . employment discrimination claims may not be legitimate, there is a countervailing

need to have a somewhat stricter evidentiary requirement in employment discrimination cases in order to prevent excessive or frivolous claims, particularly since jurors typically side with the employee in such cases, rather than the "Goliath" employer.

A continued deluge of claims would force employers to take extreme measures to protect themselves against frivolous litigation and expend valuable energy and resources to guard against potential claims of discrimination . . . Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency.

Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 Alb. L. Rev. 627, 659 (1997) (footnote omitted).

To guard against this waste, this Court properly restricted mixed-motives analysis to the rare case in which a plaintiff can demonstrate with a high degree of assurance that the challenged employment decision was at least in part the result of illegitimate motives. *Price Waterhouse*, 490 U.S. at 247. This standard should ensure that "plaintiffs in employment discrimination cases use anti-discrimination laws only as a shield against overly illegal employer conduct, and not as a sword to threaten employers into wasteful prophylactic actions." Ward, *supra*, at 663 (footnote omitted). Because circumstantial evidence does not satisfy this narrowly drawn standard, the Ninth Circuit's ruling below must be reversed.

B. The Decision Below Significantly Undermines an Employer's Defense to a Discrimination Claim

The Ninth Circuit's decision also severely prejudices employers by significantly undermining their ability to defend against discrimination claims. Forcing employers simultaneously to defend against both claims of pretext and

mixed-motives will require them to argue alternative theories in almost every case. First, they must contend that they did not discriminate and in fact based their actions on legitimate, nondiscriminatory reasons. At the same time, employers will have to argue the patently defensive alternative that even if they did discriminate, they would have made the same decision anyway.

This apparent inconsistency is likely to hurt the employer's credibility with the jury:

The primary danger is that it suggests a lack of confidence in one's own case and perhaps even a degree of desperation. The advancement of multiple theories in a case is the equivalent of throwing in "everything but the kitchen sink" in the hope that something will prove persuasive . . . Jurors will likely ask themselves why they should believe a particular theory when the attorney presenting that theory does not even seem to believe it. Multiple-choice theories are likely to elicit just such a response: "If the attorney feels so passionate about the primary theory, why does he give me another option?" In other words . . . the jury will likely perceive this approach as game playing or even worse, manipulative and dishonest.

H. Mitchell Caldwell, *et al.*, *The Art and Architecture of Closing Argument*, 76 Tul. L. Rev. 961, 993 (Mar. 2002).

A mixed-motives instruction also prejudices employers by giving juries the option of reaching a compromise verdict in favor of a sympathetic plaintiff. "[J]uries are notorious for wanting to 'split the baby.'" *Id.* at 996. (footnote omitted). A jury that is sympathetic to the plaintiff may use mixed-motives treatment as a way to find for the plaintiff without awarding damages, even though the employer can prove a legitimate reason for its decision. The attraction of a compromise verdict thus reduces an employer's chances of successfully defending against discrimination claims. By

turning most discrimination claims into mixed-motive cases, the decision below forces defendant-employers into an untenable position, and must be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO, PETITIONER

v.

CATHARINA F. COSTA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a plaintiff in a Title VII case must adduce direct evidence of discriminatory intent to trigger application of the mixed-motive analysis under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

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In the Supreme Court of the United States

No. 02-679

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO, PETITIONER

v.

CATHARINA F. COSTA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the appropriate standards for triggering mixed-motive instructions in cases of intentional discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. The United States has a substantial interest in the resolution of that question. The Attorney General is responsible for enforcing Title VII against public employers, 42 U.S.C. 2000e-5(f)(1), and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5. In addition, the United States, as the Nation's largest employer, has a strong interest in ensuring the fair and balanced enforcement of Title VII.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's gender, race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a). Recognizing that direct evidence of discrimination often may not be available to prove intentional discrimination, this Court set forth a burden-shifting framework for analyzing Title VII disparate treatment cases in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). Under the *McDonnell Douglas* framework, once a plaintiff has established a prima facie case of discrimination, the burden of going forward with evidence shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. *Ibid.* If the employer presents evidence of a nondiscriminatory reason for its action, the plaintiff may then show that the employer's proffered explanation is not the true reason for the employment decision or that a discriminatory reason more likely than not motivated the employer. *Id.* at 804; see *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). The burden of persuasion remains with the plaintiff at all times. *Burdine*, 450 U.S. at 253.

For thirty years, courts have used the *McDonnell Douglas/Burdine* pretext standard to resolve most Title VII cases. It represents a "sensible, orderly way to evaluate the evidence" in a Title VII disparate-treatment case, giving both plaintiff and defendant fair opportunities to litigate "in light of common experience as it bears on the critical question of discrimination." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). It also represents this Court's definitive construction of "[t]he language of Title VII," which "makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." 411 U.S. at 800. The *McDonnell Douglas* framework, moreover, has gained wide acceptance, not only in cases alleging discrimination on the basis of "race, color, religion, sex, or national origin" under Section 2000e-2(a) and the other provisions of Title VII, but also in similar discrimination cases, such as those alleging age discrimination under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (assuming without deciding that *McDonnell Douglas* framework applied in ADEA case and collecting court of appeals cases that so hold). Wherever it governs, the *McDonnell Douglas* framework at all times places the burden on the plaintiff to demonstrate that the adverse employment action was taken "because of" discriminatory motive.

In 1989, the Court set forth a different test for analyzing intentional discrimination claims in "mixed-motive" cases, *i.e.*, those in which the employment decision was taken for both lawful and unlawful reasons. See *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 240-247 (1989) (plurality opinion). Under *Price Waterhouse*, once a plaintiff establishes that an unlawful reason was a substantial or motivating factor in the employment decision, the burden shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent reliance on the unlawful reason. *Id.* at 258 (plurality opinion). An employer avoids Title VII liability altogether if it succeeds on its "same-decision" defense. *Ibid.* Although *Price Waterhouse* altered the burdens of proof in mixed-motive cases, it reaffirmed that the *McDonnell Douglas* pretext framework would remain the dominant rule in Title VII disparate treatment cases. See *id.* at 247 (plurality opinion); *id.* at 260 (opinion of White, J.);

id. at 261 (opinion of O'Connor, J.); *id.* at 280 (Kennedy, J., dissenting).

Congress modified the *Price Waterhouse* mixed-motive test when it passed the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071. As amended in 1991, Title VII provides: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. 2000e-2(m). The 1991 amendments overruled *Price Waterhouse*'s holding that an employer could avoid Title VII liability entirely by showing that it would have taken the same employment action absent the discriminatory motive. Under the statute, an employer violates Section 2000e-2(m) if unlawful discrimination was a motivating factor for the employment practice, but it can limit its liability to declaratory relief, limited injunctive relief, and attorney's fees and costs if it shows that it would have taken the same action absent the discrimination. See 42 U.S.C. 2000e-5(g)(2)(B). The nature of the evidence that a plaintiff must show under Section 2000e-2(m) to trigger the *Price Waterhouse* mixed-motive analysis is the issue before the Court in this case.

2. Respondent Catharina Costa worked as a truck driver and heavy equipment operator in a warehouse belonging to petitioner Caesars Palace Hotel & Casino in Las Vegas, Nevada. Respondent was the only woman covered by a collective bargaining agreement between Caesars and her union. During respondent's seven years of employment at Caesars, she was repeatedly disciplined for, among other infractions, tardiness, absenteeism, and using vulgar language. According to respondent, however, male workers were not disciplined for the same conduct and so the disciplinary actions taken against her amounted to gender discrimination. Pet.

App. 3a-6a. In 1994, respondent was involved in a verbal and physical confrontation with another co-worker, Herb Gerber, that resulted in respondent's termination and Gerber's suspension. *Id.* at 6a. Respondent was terminated, according to petitioner, because of her history of disciplinary problems, as well as her altercation with Gerber. *Id.* at 7a.

3. After an arbitrator upheld her termination, respondent filed this Title VII action against petitioner, alleging gender discrimination in the conditions of her employment and termination. The case was tried before a jury. At the conclusion of the evidence, the district court instructed the jury that:

> The plaintiff has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions, and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female. If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

Pet. App. 57a. Petitioner stated at trial that it had no objection to this instruction. Tr. 460.

The district court also gave the jury the following "mixed-motive" instruction:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your

verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

Pet. App. 33a-34a, 57a-58a. Petitioner objected to this instruction on the ground that the case was not a "mixed motive" case because respondent failed to submit "direct evidence" that her gender was a motivating factor in her firing. Tr. 460.

The jury was given a Verdict Form in which it was first asked:

1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?

Pet. App. 88a. The jury answered this question "Yes." *Ibid.* The Verdict Form then stated:

If you answered yes, please answer the following special interrogatory:

2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?

LN

P.02/05

Pet. App. 89a. The jury answered this question "Yes." *Ibid.* The Form then instructed the jury to answer the third question:

3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?

Pet. App. 89a. The jury answered this question "No." *Ibid.* The jury awarded respondent $64,377.74 for "financial loss," $200,000 in damages for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life, and $100,000 in punitive damages. *Id.* at 89a-90a.

4. A panel of the Ninth Circuit reversed, holding that "in the absence of substantial evidence of conduct or statements by the employer directly reflecting discriminatory animus, the giving of a mixed-motive instruction was reversible error." Pet App. 55a. The panel noted that the Ninth Circuit had not previously addressed "what evidentiary burden a plaintiff must satisfy to prove her gender was a motivating factor in an adverse employment action." *Id.* at 60a. Relying on Justice O'Connor's concurring opinion in *Price Waterhouse* and decisions of other circuits, the panel held that because respondent had failed to produce direct and substantial evidence of discriminatory intent, "the district court erred in giving the jury a mixed-motive instruction." *Id.* at 65a.

5. Rehearing the case en banc, the Ninth Circuit affirmed in part and reversed and remanded in part. In a 9-4 decision, the majority held that "Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called 'mixed-motive' case." Pet. App. 2a. The en banc court accordingly affirmed the district court's liability finding, as well as the jury's back pay and compensatory damages awards. In light of this Court's intervening decision in *Kol-*

stad v. *American Dental Ass'n*, 527 U.S. 526 (1999), the court of appeals remanded the case for reconsideration of the award of punitive damages. Pet. App. 45a-47a.

The en banc court disagreed with the panel's conclusion that under *Price Waterhouse* a plaintiff must produce direct and substantial evidence of discriminatory intent. Rather, the court characterized Justice O'Connor's discussion of the direct evidence requirement in *Price Waterhouse* as merely a "passing reference" (Pet. App. 8a), and declined, "where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code" (*id.* at 23a-24a (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 515 (1993))). The en banc court also reasoned that because the 1991 amendments to Title VII specified that employers may no longer escape liability simply by showing other sufficient causes for their actions, "the premise for Justice O'Connor's comment is wholly abrogated"; *i.e.*, "there is no longer a basis for any special 'evidentiary scheme' or heightened standard of proof to determine 'but for' causation." Pet. App. 17a.

Applying this standard, the en banc court concluded that the evidence was sufficient to warrant issuance of a mixed-motive instruction (Pet. App. 32a-35a); that respondent presented sufficient evidence for a reasonable jury to find that sex discrimination was a motivating factor in a number of adverse employment actions, including her termination (*id.* at 36a-42a); and that "[t]here was a substantial basis for the jury to conclude that Caesars did not meet its burden in demonstrating that it would have made the same decision absent consideration of sex" (*id.* at 43a).

6. The four dissenting judges concluded that "[t]he majority's analysis is not persuasive and should be corrected because it disregards the holding of [*Price Waterhouse*] that is reflected in Justice O'Connor's concurring opinion." Pet. App. 48a. After summarizing the plurality and concurring

opinions in *Price Waterhouse*, the dissenters concluded that Justice O'Connor's opinion requiring the use of direct evidence to prove a mixed-motive case was the holding under the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), because that opinion "concurred in the judgment on the narrowest grounds." Pet. App. 49a. The 1991 amendments to Title VII, moreover, "did not modify the Supreme Court's prior holding on the need for direct evidence." *Id.* at 50a. The dissenters further observed that "the majority's holding puts our circuit in conflict with almost all others" (*id.* at 51a), and emphasized that "[t]he Supreme Court's seminal opinion in *McDonnell Douglas* would be effectively overruled by an incorrect interpretation of [*Price Waterhouse*] that jettisons the direct evidence requirement" (*id.* at 53a).

SUMMARY OF ARGUMENT

The court of appeals erred in holding that a plaintiff in a Title VII mixed-motive case does not have a heightened evidentiary burden of presenting direct evidence of discriminatory intent. Contrary to the majority of courts of appeals that have addressed the issue, the en banc court failed to find that this Court's decision in *Price Waterhouse* requires plaintiffs in Title VII cases to proffer direct and substantial evidence of discriminatory intent as a prerequisite to establishing liability under the mixed-motive framework.

The en banc court also erred in holding that the 1991 amendments to Title VII abrogate any need for a heightened evidentiary standard for plaintiffs in mixed-motive cases. Both the text and legislative history of Section 107 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, demonstrate that Congress enacted the relevant 1991 amendments to overrule only the portion of the *Price Waterhouse* decision that excused an employer from all liability upon a showing that it would have taken the same employment action without regard to any illegitimate factor. Far

from undermining the need for a heightened, direct evidence standard in mixed-motive cases, Section 107, by expanding liability in mixed-motive cases, supports requiring plaintiffs to make a strong initial showing, through direct evidence, that discriminatory intent in fact motivated the challenged employment action. Congress, moreover, did not evidence an intent to modify the distinction drawn in *Price Waterhouse* between pretext and mixed-motive cases, nor did it attempt to alter *Price Waterhouse*'s holding regarding the plaintiff's evidentiary burden in mixed-motive cases, including the direct evidence requirement. Indeed, before the decision below, every court of appeals that had considered the effect of the 1991 amendments on *Price Waterhouse*'s direct evidence requirement had found that those amendments do not address whether a plaintiff must show direct evidence of discrimination as a precondition to applying a mixed-motive analysis.

The courts of appeals, however, are in disagreement over the meaning of "direct evidence." Although the question is not free from doubt, the better reading of *Price Waterhouse* is that direct evidence means non-circumstantial or non-inferential evidence. In other words, in order to justify shifting the burden of persuasion to the defendant, the plaintiff must submit evidence that, without resort to inferences or presumptions, establishes that race or gender was a substantial, motivating factor in the employer's decision.

For these reasons, the Court should vacate the Ninth Circuit's holding regarding the plaintiff's evidentiary burden in mixed-motive cases, reaffirm the direct evidence requirement announced in Justice O'Connor's *Price Waterhouse* opinion, and remand this case for further proceedings under the correct legal standard.

ARGUMENT

PLAINTIFFS IN TITLE VII MIXED-MOTIVE CASES MUST ADDUCE DIRECT EVIDENCE OF DISCRIMINATORY INTENT TO INVOKE THE MIXED-MOTIVE ANALYSIS UNDER *PRICE WATERHOUSE* V. *HOPKINS*

In 1989, a plurality of this Court in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241, held that a plaintiff may recover for gender discrimination under Title VII if she shows that gender was a motivating factor, but not the sole motive, in the contested employment decision. The employer would not be liable in such a case, however, if it presents evidence showing that it would have made the same decision regardless of the discriminatory motive. *Id.* at 244-245. Justice White and Justice O'Connor separately concurred in the judgment. The plurality opinion and both concurring opinions emphasized that, unlike in single-motive or "pretext" cases, a plaintiff in a mixed-motive case must meet a heightened burden of proof by presenting evidence that discriminatory intent played a substantial, motivating role in the challenged employment decision. *Id.* at 248-250 & n.13 (plurality opinion); *id.* at 259 (opinion of White, J.); *id.* at 275 (opinion of O'Connor, J.).

Justice O'Connor's concurrence further emphasized that a plaintiff may invoke this "mixed-motive" test only after the plaintiff presents "direct evidence that decisionmakers placed substantial negative reliance on [the] illegitimate criterion." 490 U.S. at 277. The four-Justice plurality acknowledged Justice O'Connor's direct evidence requirement and stated that its formulation of the heightened showing a plaintiff must make in a mixed-motive case, which focused on the requirement that the illegitimate criterion was a motivating or substantial factor in the adverse employment action, was not "meaningfully different from" Justice

O'Connor's direct evidence standard. *Id.* at 250 n.13. Similarly, the three dissenting Justices plainly read Justice O'Connor's direct evidence requirement as part of the Court's holding. *Id.* at 280 ("I read the opinions as establishing that in a limited number of cases Title VII plaintiffs, by presenting direct and substantial evidence of discriminatory animus, may shift the burden of persuasion to the defendant to show that an adverse employment decision would have been supported by legitimate reasons. The shift in the burden of persuasion occurs only where a plaintiff proves by direct evidence that an unlawful motive was a substantial factor actually relied upon in making the decision."); *id.* at 290-291 ("[T]he Court makes clear that the *Price Waterhouse* scheme is applicable only in those cases where the plaintiff has produced direct and substantial proof that an impermissible motive was relied upon in making the decision at issue.").

Moreover, all of the opinions in *Price Waterhouse* recognized the continuing importance of the "pretext" framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981), for analyzing disparate treatment cases under Title VII. See 490 U.S. at 247 (plurality opinion) ("[T]he premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine*'s evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed."); *id.* at 260 (opinion of White, J.) (applying [*Price Waterhouse*] approach to causation in Title VII cases is not a departure from, and does not require modification of, the Court's holdings in [*Burdine* and *McDonnell Douglas*]"); *id.* at 261 (opinion of O'Connor, J.) ("The evidentiary rule the Court adopts today should be viewed as a supplement to the

careful framework established by our unanimous decisions in [*McDonnell Douglas* and *Burdine*]."); *id.* at 280 (Kennedy, J., dissenting) ("[T]he Court alters the evidentiary framework of *McDonnell Douglas* and *Burdine* for a closely defined set of cases."). The Court, therefore, suggested that most Title VII cases would continue to be analyzed under the *McDonnell Douglas/Burdine* pretext analysis, and that the burden of persuasion would shift to the defendant only where the plaintiff had satisfied a heightened burden of showing that an impermissible consideration was a substantial, motivating factor in the employer's decision.

Acting specifically in response to the *Price Waterhouse* decision, Congress amended Title VII in 1991, to provide that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1075 (42 U.S.C. 2000e-2(m)). Congress also provided that "[o]n a claim in which an individual proves a violation under section 2000e-2(m)" (*i.e.*, *Price Waterhouse* mixed-motive claims), if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor," the employer would be liable for only declaratory relief, injunctive relief, attorney's fees and costs, but not damages, reinstatement, or back pay. Pub. L. No. 102-166, § 107(b), 105 Stat. 1075 (42 U.S.C. 2000e-5(g)(2)(B)). Through these amendments, Congress overturned the holding in *Price Waterhouse* that allowed employers to avoid Title VII liability entirely by showing that the same employment action would have been taken absent the discriminatory motive. Congress, however, did not attempt to modify the clear distinction drawn in *Price Waterhouse* between pretext and mixed-motive cases,

nor did it attempt to alter its holding regarding the plaintiff's evidentiary burden in mixed-motive cases.

The Ninth Circuit's decision in this case holds that the 1991 amendments to Title VII altered the standards of causation and proof in all Title VII cases and largely eliminated the distinction between pretext and mixed-motive cases. Although there is some reason to doubt whether Title VII initially drew a sharp distinction between pretext and mixed-motive cases, the courts have consistently treated these cases as distinct. Moreover, the 1991 amendments, by providing distinct remedies in mixed-motive cases, appear to reinforce that distinction. In addition, by introducing jury trials, the 1991 amendments created the possibility that jury instructions in mixed-motive cases could confuse jurors into thinking that the defendant bears the burden of proof on issues related to the defendant's conduct. For these reasons, virtually every court of appeals to address the plaintiff's burden in a mixed-motive case has maintained the distinction between the types of cases and employed some form of the direct evidence test to police the line. That approach reflects the better view of the 1991 amendments.

A. Under *Price Waterhouse* v. *Hopkins*, Plaintiffs In Mixed-Motive Cases Must Initially Present Direct Evidence Of Discriminatory Intent

The Ninth Circuit's en banc decision dismissed Justice O'Connor's requirement that a plaintiff must present "direct evidence" that an impermissible consideration was a substantial, motivating factor in an employment decision as being merely a "passing reference." Pet. App. 8a. As the discussion above demonstrates, that characterization is plainly mistaken.

Despite the apparently fragmented decision in *Price Waterhouse*, all nine Justices agreed that the standard the Court announced for mixed-motive cases did not alter the

analytical framework of the *McDonnell Douglas* pretext standard, which they acknowledged would still govern traditional disparate treatment cases under Title VII where the jury must choose between the plaintiff's showing of an impermissible motive and the employer's showing of a legitimate one. See *Price Waterhouse*, 490 U.S. at 246-247 (plurality opinion); *id.* at 260 (opinion of White, J.); *id.* at 270 (opinion of O'Connor, J.); *id.* at 280 (Kennedy, J., dissenting). It is also clear that Justices White and O'Connor both agreed with the four Justices in the plurality that a plaintiff in a mixed-motive case must satisfy a heightened burden of proof by presenting evidence that discriminatory intent played a substantial role in the challenged employment decision. *Id.* at 247 n.12, 248-249 (plurality opinion); *id.* at 259 (opinion of White, J.); *id.* at 275 (opinion of O'Connor, J.). The plurality disclaimed any meaningful difference between its standard and Justice O'Connor's direct evidence requirement, *id.* at 250 n.13, and the three dissenting Justices plainly viewed the direct evidence requirement as an integral part of the Court's holding, *id.* at 280, 290-291.

Indeed, prior to the Ninth Circuit's en banc decision in this case, all of the courts of appeals had interpreted *Price Waterhouse* as requiring a plaintiff to present direct evidence that an impermissible consideration was a substantial, motivating factor in an employment decision before shifting the burden of persuasion to the employer to show that it would have taken the same employment action without regard to the impermissible consideration. The First and Third Circuits have explicitly held that, under the rule of *Marks* v. *United States*, 430 U.S. 188, 193 (1977), Justice O'Connor's concurring opinion is the binding holding in *Price Waterhouse*.[1] Moreover, the Fifth, Sixth, Seventh, Eighth,

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[1] See, *e.g.*, *Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) ("Most courts agree that Justice O'Connor's seminal

Tenth, and Eleventh Circuits have implicitly endorsed Justice O'Connor's concurring opinion by requiring plaintiffs in mixed-motive cases to present direct evidence of discrimination to shift the burden of persuasion to the employer to show that the same adverse employment decision would have been made regardless of the discrimination.[2] The D.C. and Second Circuits also require plaintiffs in mixed-motive cases to proffer evidence of conduct or statements that reflect directly the alleged discriminatory intent and that bear directly on the contested employment decision, even though they question whether Justice O'Connor's direct evidence

concurrence in *Price Waterhouse* furnishes the best device for testing quality" of the available evidence."); *Fakete* v. *Aetna, Inc.*, 308 F.3d 335, 337 n.2 (3d Cir. 2002) ("Justice O'Connor's opinion * * * represents the holding of the fragmented Court in *Price Waterhouse*.").

[2] See, *e.g.*, *Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1216-1217 (5th Cir. 1995) (employees not entitled to mixed-motive jury instruction because plaintiff's proffered statements were not direct evidence of age discrimination); *Laderach* v. *U-Haul*, 207 F.3d 825, 829 (6th Cir. 2000) (supervisor's statements that he would not promote plaintiff because of her gender and would not allow her to answer the telephone because "women are not mechanically inclined" were direct evidence of discriminatory intent); *Oates* v. *Discovery Zone*, 116 F.3d 1161, 1170-1171 (7th Cir. 1997) (plaintiff failed to present direct evidence of discriminatory intent that related to the contested employment action); *Mohr* v. *Dustrol, Inc.*, 306 F.3d 636, 640-641 (8th Cir. 2002) (foreman's statements that he would not have any women on his crew constituted direct evidence of discrimination); *Tomsic* v. *State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1478 (10th Cir. 1996) (stereotyped remarks reflected only the supervisor's personal opinion and did not qualify as direct evidence of discrimination by employer); *EEOC* v. *Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) (decisionmaker's comment that he would not hire blacks was direct evidence that racial discrimination motivated the employer's promotion decision).

requirement is the holding in *Price Waterhouse*.[3] As discussed in Part C, *infra*, the courts of appeals have adopted different standards for precisely what constitutes "direct evidence," but every other court of appeals that has applied *Price Waterhouse* has adopted the requirement that plaintiffs in mixed-motive cases must meet a heightened burden of proof.

B. The Civil Rights Act Of 1991 Did Not Alter The Plaintiff's Burden To Adduce Direct Evidence of Discrimination In Mixed-Motive Cases

The Ninth Circuit also erred in concluding that the Civil Rights Act of 1991 altered the standards of causation and proof in all Title VII cases, thereby largely eliminating the distinction between pretext and mixed-motive cases. Pet. App. 16a-18a. As with its reading of *Price Waterhouse*, the Ninth Circuit's interpretation of Congress's 1991 amendments to Title VII stands alone. Except for the en banc decision below, every court of appeals that has considered the effect of the 1991 amendments on *Price Waterhouse*'s direct evidence requirement has found that those amendments do not address whether a plaintiff must show direct evidence of discrimination as a precondition to applying a mixed-motive analysis. See, *e.g.*, *Weston-Smith* v. *Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (1st Cir. 2002) (stating that the 1991 amendments are "silent on exactly what showing is needed to trigger a mixed-motive case"); *Watson* v. *SEPTA*, 207 F.3d 207, 216 (3d Cir. 2000), cert. denied, 531 U.S. 1147 (2001); *Medlock* v. *Ortho Biotech, Inc.*, 164 F.3d 545, 552 (10th Cir.), cert. denied, 528 U.S. 813 (1999); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), cert. denied, 506 U.S. 826 (1992). In addition, shortly after

[3] See, *e.g.*, *Thomas* v. *NFL Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997); *Tyler* v. *Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2d Cir.), cert. denied, 506 U.S. 826 (1992).

Congress enacted the 1991 amendments, the EEOC adopted guidelines setting forth the standards of proof and causation for pretext and mixed-motive cases, respectively, and analyzing the effect of the 1991 amendments on those standards. See *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment Theory*, 8 Lab. Rel. Rep. (BNA) 405:6915 (July 7, 1992) (EEOC Guide). As those guidelines explain, "most appellate court decisions that have addressed the question since *Price Waterhouse* have agreed with Justice O'Connor that direct evidence is required for the mixed motives framework to apply. *Nothing in Section 107 [of the 1991 amendments] alters this aspect of the Supreme Court's decision.*" *Id.* at 405:6921-405:6922 (emphasis added).

Both the text and legislative history of the 1991 Title VII amendments indicate that those amendments dealt solely with the scope of the employer's liability in an appropriate mixed-motive case. Congress intended to overrule only one aspect of this Court's *Price Waterhouse* decision—to permit limited liability even where a defendant in a properly classified mixed-motive case has demonstrated that it would have taken the same employment action without regard to the impermissible factor that tainted its decision. Congress, however, did not alter the *McDonnell Douglas/Burdine* pretext framework or the direct evidence standard for determining when a case is properly subject to a mixed-motive analysis. Nor did Congress intend to end the distinction between pretext and mixed-motive cases that has long been an aspect of this Court's Title VII jurisprudence and that none of the separate opinions in *Price Waterhouse* sought to question.

1. *The text of the 1991 amendments demonstrates that Congress did not alter* Price Waterhouse*'s direct evidence requirement*

Section 107(a) of the Civil Rights Act of 1991 expressly applies only to mixed-motive cases by providing that an unlawful employment practice is established where "the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*" 42 U.S.C. 2000e-2(m) (emphasis added). The "other factors" phrase is clearly a reference to mixed-motive cases, and its inclusion belies any suggestion that the "motivating factor" analysis was intended to apply to pretext as well as mixed-motive cases. Indeed, there would have been no need to add this phrase if Congress intended all disparate treatment cases to be considered the same way. See *Watson*, 207 F.3d at 217 (interpreting Section 2000e-2(m) to avoid rendering statutory language superfluous or meaningless). If Congress had wanted to apply the motivating factor standard to all Title VII cases, it could have done so directly by simply defining Section 2000e-2(a)'s prohibition on employment actions taken "because of" race, gender, or other impermissible factors as requiring the plaintiff in all cases to prove only that the discriminatory intent was a motivating factor in the action. By including the reference to "other factors also motivat[ing] the practice," Congress could only have intended to limit the scope of Section 2000e-2(m) to *Price Waterhouse*-type mixed-motive cases.

In addition, the term "demonstrates" in Section 107(a) is identical to Justice O'Connor's use of that term in her concurring opinion and suggests that, like the opinions in *Price Waterhouse* themselves, the amendment was only intended to affect mixed-motive cases. See, *e.g.*, *Price Waterhouse*, 490 U.S. at 276 (opinion of O'Connor, J.) ("Requiring that the

plaintiff *demonstrate* that an illegitimate factor played a substantial role in the employment decision identifies those employment situations where the deterrent purpose of Title VII is most clearly implicated.") (emphasis added). As the Third Circuit explained in *Watson*, "the term 'demonstrates' is not the most apt choice if the drafters wanted to describe, not just cases in which the plaintiff offers 'direct' evidence of discriminatory animus, but also the great number of disparate treatment cases in which the plaintiff, proceeding under *McDonnell Douglas*, establishes the elements of a prima facie case and urges the factfinder to infer discriminatory animus from the employer's asserted failure to offer a credible alternative reason for the contested employment action." 207 F.3d at 218.

In addition, Section 107(b), 42 U.S.C. 2000e-5(g)(2)(B), which limits the types of remedies available in mixed-motive cases, expressly states that this provision applies only to "claim[s] in which an individual proves a violation under section 2000e-(2)(m)." If, as the Ninth Circuit assumed, Section 107(a) had been meant to affect *all* disparate treatment cases against employers, then Section 107(b) naturally would have been drafted to apply to all cases brought *under 42 U.S.C. 2000e-2(a)*, the provision that sets out unlawful employment practices. See *Watson*, 207 F.3d at 218. The fact that Congress explicitly limited Section 2000e-5(g)(2)(B) to apply only to claims under Section 2000e-2(m) confirms "that Congress intended to draw a distinction between most disparate-treatment cases against employers (which are brought under 42 U.S.C. § 2000e-2(a)) and a subset of cases 'in which an individual proves a violation under Section 2000e-2(m).'" *Watson*, 207 F.3d at 218. If Congress did not intend to preserve the separate burdens of proof between pretext and mixed-motive cases, it would not have provided that Section 2000e-5(g)(2)(B) applies only to claims under Section 2000e-(2)(m).

This reading of the 1991 amendments is further supported by the context in which Congress enacted them. At the time Congress enacted the 1991 amendments, it was settled that *Price Waterhouse* altered the standard of proof only in mixed-motive cases and that most Title VII cases would continue to be evaluated under *McDonnell Douglas* pretext principles, which at all times place the burden of persuasion on the plaintiff. Moreover, before the enactment of the 1991 amendments, several courts of appeals had expressly adopted the direct evidence requirement announced in Justice O'Connor's *Price Waterhouse* opinion. See, *e.g.*, *Jackson* v. *Harvard Univ.*, 900 F.2d 464, 467 (1st. Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus."), cert. denied, 498 U.S. 848 (1990); *Gagne* v. *Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 315-316 (6th Cir. 1989) ("[T]he *Price Waterhouse* Court specifically admonished that the new standard would apply *only* in the limited circumstances where the employee had produced *direct* evidence" of discriminatory intent.), overruled on other grounds, *Kline* v. *Tennessee Valley Auth.*, 128 F.3d 337 (6th Cir. 1997); *EEOC* v. *Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990) ("In a direct evidence case, the plaintiff must produce direct testimony that the employer acted with discriminatory motive.").

Accordingly, when Congress enacted the 1991 amendments, it did so against the background of settled case law defining the standards of proof and causation for *McDonnell Douglas* pretext cases, on the one hand, and for plaintiffs to shift the burden of persuasion to the defendant in mixed-motive cases, on the other. This Court should not presume that by enacting the 1991 amendments, which on their face only address remedies in mixed-motive cases, Congress intended to eliminate either the distinctions between pretext and mixed-motive cases or the direct evidence requirement that defines the line between the two. See *United States* v.

Wells, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents."). Cf. *CFTC* v. *Schor*, 478 U.S. 833, 845-846 (1986) (Congress's decision not to alter an established interpretation of a statute upon reenacting the statute is "persuasive evidence that the interpretation is the one intended by Congress.") (citation omitted); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986).

2. *The legislative history of the 1991 amendments confirms that Congress did not alter* Price Waterhouse*'s direct evidence requirement*

The legislative history of the 1991 amendments further demonstrates Congress's intent to preserve the distinction between mixed-motive and pretext cases and to change only the remedies applicable to mixed-motive cases. See, *e.g.*, *Watson*, 207 F.3d at 219; *Fields* v. *New York State Office of Mental Retardation & Developmental Disabilities*, 115 F.3d 116, 124 (2d Cir. 1997); *Fuller* v. *Phipps*, 67 F.3d 1137, 1144 (4th Cir. 1995). For example, the House Report makes clear that Congress designed Section 107 to "overrule[] *one aspect* of the Supreme Court's decision in *Price Waterhouse*." H.R. Rep. No. 40, 102d Cong., 1st. Sess., Pt. 1, at 48 (1991) (emphasis added); accord *id.* at 101 (noting bill "overturns *part* of the Supreme Court's decision in *Price Waterhouse* in order to hold an employer liable whenever discriminatory considerations play a part in an employment decision, even if other, legitimate motives are also present") (emphasis added); H.R. Rep. No. 40, *supra*, Pt. 2, at 16 ("Section 5 overturns *one aspect* of the Supreme Court's decision in *Price Waterhouse*.") (emphasis added). Under the heading, "The Need To Overturn *Price Waterhouse*," the House Report identifies the only portion of *Price Waterhouse* that the legislation was meant to overrule as the holding that "*the defendant may avoid a finding of liability* * * * by proving

by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." H.R. Rep. No. 40, *supra*, Pt. 1, at 46 (emphasis added). The Report further explains that Section 107 "would clarify that proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not the liability for discriminatory employment practices, but only the appropriate *remedy*." *Id.* at 48. Moreover, the section of the House Report containing minority views on the legislation expressly characterizes the amendments as "dealing with mixed motive cases." *Id.* at 157.

3. *The Ninth Circuit's approach would frustrate much of this Court's Title VII jurisprudence*

The Ninth Circuit's reading of the 1991 amendments would fundamentally alter all Title VII cases by allowing a plaintiff to proceed in every case under the instructions applicable to mixed-motive cases. There is no support in the 1991 Act to show that Congress intended to transform Title VII in such a way.

The Ninth Circuit's en banc decision threatens to eliminate the traditional distinction between pretext and mixed-motive cases. Indeed, the en banc majority stated that "[n]or are 'single-motive' and 'mixed-motive' cases fundamentally different categories of cases." Pet. App. 31a. The majority's formulation of the mixed-motive analysis, as the dissent pointed out, would improperly provide an incentive for plaintiffs to "opt for the [*Price Waterhouse*] framework to avoid having to show pretext." *Id.* at 53a.

Lastly, far from undermining the premise for imposing a higher evidentiary burden on plaintiffs as the Ninth Circuit surmised, Section 107 of the Civil Rights Act of 1991 provides even greater support for such a requirement. Under that amendment, an employer can no longer avoid Title VII

liability by demonstrating that it would have made the same decision absent consideration of an impermissible factor. As the Fourth Circuit stated in *Fuller*, "[t]he Civil Rights Act of 1991 modified the *Price Waterhouse* scheme, making mixed-motive treatment *more favorable* to plaintiffs." 67 F.3d at 1142 (emphasis added). Justice O'Connor noted in *Price Waterhouse* that the burden-shifting that occurs in a mixed motive case is "strong medicine," 490 U.S. at 262, such that the plaintiff must make a "strong showing of illicit motivation" before "the factfinder is entitled to presume that the employer's discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer." 490 U.S. at 276-277. The 1991 amendments make that "medicine" even stronger for defendants by expanding the scope of liability in mixed-motive cases. Accordingly, they only underscore the need to require plaintiffs to come forward with direct evidence that discriminatory animus played a substantial, motivating role in the challenged conduct.

C. "Direct Evidence" Of Discrimination Must Directly Reflect The Alleged Discriminatory Intent And Be Directly Related To The Challenged Employment Action

Although, aside from the Ninth Circuit, the courts of appeals are in unison in holding that a plaintiff must satisfy a heightened standard of proof in order to qualify for a mixed-motive instruction, they have struggled to define the contours of *Price Waterhouse*'s direct evidence requirement. Virtually all of the courts of appeals have interpreted Justice O'Connor's reference to "direct evidence" to require, at a minimum, that the plaintiff's evidence directly relate to the decisionmaking process that led to the adverse employment action at issue. See, *e.g.*, *Cronquist* v. *City of Minneapolis*, 237 F.3d 920, 925 (8th Cir. 2001); *Thomas* v. *NFL Players Ass'n*, 131 F.3d 198, 204-205 (D.C. Cir. 1997); *Hook* v. *Ernst*

& Young, 28 F.3d 366, 374 (3d Cir. 1994); *Fuller*, 67 F.3d at 1142; *Ostrowski* v. *Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992). That is, the discriminatory motive must be directly related to the decisionmaker and to the injury alleged by the plaintiff. As the Seventh Circuit stated in *Oates* v. *Discovery Zone*, 116 F.3d 1161, 1170 (7th Cir. 1997), "a plaintiff's so-called 'direct' evidence need not only speak directly to the issue of discriminatory intent, it must also relate to the specific employment decision in question." See *Weston-Smith*, 282 F.3d at 65 (direct evidence is evidence that sufficiently links the person who utters a discriminatory statement to the decisionmaking process); *Simmons* v. *Oce-USA, Inc.*, 174 F.3d 913, 915 (8th Cir. 1999) (defining direct evidence as "conduct or statements by persons involved in the decisionmaking process * * * directly reflecting the alleged discriminatory attitude * * * sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision"); *De la Cruz* v. *New York City Human Res. Admin. Dep't of Soc. Servs.*, 82 F.3d 16, 23 (2d Cir.) (stating that "a plaintiff must initially proffer evidence that an impermissible criterion was *in fact* a 'motivating' or 'substantial' factor in the employment decision"), mot. denied, 519 U.S. 805 (1996); *Fuller*, 67 F.3d at 1142 ("What is required * * * is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.").

The courts of appeals are divided over whether the direct evidence requirement also imposes a limitation on the *type* of evidence the plaintiff must show to warrant shifting the burden of persuasion to the defendant. Several courts of appeals have read the direct evidence standard as requiring the plaintiff to submit "evidence, which if believed, proves [the] existence of [a] fact in issue *without inference or presumption*." *Rollins* v. *Tech-South, Inc.*, 833 F.2d 1525, 1529

n.6 (11th Cir. 1987) (quoting *Black's Law Dictionary* 413 (5th ed. 1979)); accord *Shorter* v. *ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999); *Haas* v. *ADVO Sys., Inc.*, 168 F.3d 732, 734 n.2 (5th Cir. 1999); *Troupe* v. *May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994); *Jackson* v. *Harvard Univ.*, 900 F.2d 464, 467 (1st. Cir.) ("Direct evidence is evidence which, in and of itself, shows a discriminatory animus."), cert. denied, 498 U.S. 848 (1990). The EEOC has similarly defined direct evidence as "any written or verbal policy or statement made by a respondent or respondent official *that on its face* demonstrates a bias against a protected group and is linked to the complained of adverse action." EEOC Guide at 405:6917.[4] Moreover, under this approach, the employer's statements or conduct relied upon must not be too remote in time to the challenged employment action. See *Simmons*, 174 F.3d at 916 (supervisor's racial comments did not constitute direct evidence of discrimination where the plaintiff failed to show a "causal link" between the racial comments at issue and his termination two years later); *Nitschke* v. *McDonnell Douglas Corp.*, 68 F.3d 249, 252-253 (8th Cir. 1995) (finding that document written six years prior to plaintiff's termination was not direct evidence of discrimination).

Evidence that merely raises an inference of discrimination is, therefore, insufficient to shift the burden to the defendant. Unlike pretext cases, the evidence the plaintiff must present in mixed-motive cases "*is so revealing of discriminatory animus that it is not necessary to rely on any presumption from the prima facie case* [as is necessary in a pretext action] to shift the burden" to the defendant. *Starceski* v. *Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995). Purely statistical evidence, evidence establishing merely the plaintiff's qualification for and the availability of a position, and stray remarks in the workplace by persons who are not involved in the pertinent decisionmaking process—all of which might be sufficient to make out a prima facie case under *McDonnell Douglas*—are insufficient for invoking the mixed-motive analysis. See *Ostrowski*, 968 F.2d at 182; *Price Waterhouse*, 490 U.S. at 277 (opinion of O'Connor, J.). In addition, remarks by a decisionmaker reflecting mere expressions of "personal opinion," and not existing policy, do not constitute direct evidence. *Tomsic* v. *State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1478 (10th Cir. 1996); accord *Nitschke*, 68 F.3d at 253 (finding no "causal relationship" between the personal views of the president of the defendant corporation and plaintiff's termination six years later).[5]

Other courts of appeals have held that the direct evidence requirement permits a plaintiff to establish that discriminatory intent was a motivating factor by either direct or circumstantial evidence. These cases typically emphasize that

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[4] The EEOC guidelines, however, note that direct evidence "is not limited to evidence from which *no* inferences need be drawn," but instead refers to "evidence that 'relates to actions or statements of an employer reflecting a discriminatory attitude correlating to the discrimination or retaliation complained of.'" EEOC Guide at 405:6918-405:6919 n.9 (quoting *Caban-Wheeler* v. *Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990)).

[5] Under this reading of direct evidence, relevant documents establishing that an existing policy itself is discriminatory would be sufficient. *Heim* v. *Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993); *Ostrowski*, 968 F.2d at 182. For example, a telephone-marketing corporation's pre-election "get-out-the-vote" calling campaign, in which African-American employees used a "black script" to call African-American voters while white employees used a "white script" to call white voters, is direct evidence of disparate treatment in job assignments based on race. See *Ferrill* v. *Parker Group, Inc.*, 168 F.3d 468, 472 (11th Cir. 1999). Statements or conduct by a person who "played a pivotal role" in the decisionmaker's treatment of the plaintiff may also be considered. See *Mohr*, 306 F.3d at 641; *Weston-Smith*, 282 F.3d at 65.

the law generally permits a plaintiff to prove her case without limitation as to the type of evidence upon which she can rely, and that circumstantial evidence is generally considered to be as persuasive as direct evidence. See, *e.g.*, *Ostrowski*, 968 F.2d at 182; *Fakete* v. *Aetna, Inc.*, 308 F.3d 335, 338 n.2 (3d Cir. 2002); *Bellaver* v. *Quanex Corp.*, 200 F.3d 485, 492 (7th Cir. 2000); *Medlock*, 164 F.3d at 550; *Thomas*, 131 F.3d at 203; see also *Fernandes* v. *Costa Bros. Masonry, Inc.*, 199 F.3d 572, 581-583 (1st Cir. 1999) (collecting cases).

Although the question is not free from doubt, the view that the direct evidence requirement requires a plaintiff to submit non-inferential evidence or evidence that on its face establishes the discriminatory motive appears most consistent with this Court's decision in *Price Waterhouse*. Justice O'Connor in *Price Waterhouse*, for example, contrasted the requirement for "direct evidence" to shift the burden of persuasion in mixed-motive cases with the evidentiary standard applicable in pretext cases: "*McDonnell Douglas* itself dealt with a situation where the plaintiff presented *no direct evidence* that the employer had relied on a forbidden factor," but instead "was based only on * * * statistical probabilit[ies]" and "inference[s]." 490 U.S. at 270 (emphasis added). "In the face of this *inferential proof*, the employer's burden was deemed to be only one of production." *Ibid.* (emphasis added). She concluded, however, that "the employer is not entitled to the same presumption of good faith where there is *direct evidence* that it has placed substantial reliance on factors whose consideration is forbidden by Title VII." *Id.* at 271 (emphasis added). In other words, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that *direct evidence* of intentional discrimination is hard to come-by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is*

direct evidence of intentional discrimination." *Ibid.* (emphasis added). The dissent also appears to have used "direct evidence" to contrast the type of inferential evidence applicable under the *McDonnell Douglas* test. See *id.* at 291 (Kennedy, J., dissenting) (noting that the direct evidence standard will require lower courts "to make the often subtle and difficult distinction between 'direct' and 'indirect' or 'circumstantial' evidence").

Moreover, this reading of direct evidence best furthers the purposes of Title VII by restricting mixed-motive burden-shifting instructions to only those cases where courts have a high degree of confidence that the employer's decision was tainted by improper motives. As Justice O'Connor explained, it is only where a plaintiff has produced such direct evidence that discriminatory animus was a substantial, motivating factor that courts should resort to the "strong medicine" of imposing on the defendant the burden of proving that it would have taken the same employment action without regard to impermissible factors.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings under the correct legal standard.

Respectfully submitted.

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In the Supreme Court of the United States

DESERT PALACE, INC., DBA CAESARS PALACE HOTEL & CASINO,

Petitioner,

v.

CATHARINA F. COSTA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) and its 67 state and local affiliates have a membership of over 3,000 attorneys, and NELA is the country's only professional membership organization of lawyers who regularly represent employees in labor, employment and civil rights disputes. NELA regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the proper interpretation and application of Title VII to insure that the rights of workers are fully protected. For example, NELA participated in filing *amicus curiae* briefs in this Court's decisions in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002); and *West v. Gibson*, 527 U.S. 212 (1999).

NELA members represent thousands of individuals in this country who have suffered unlawful employment discrimination, including sex discrimination. The interest of NELA in this case is to protect the rights of its members' clients, by ensuring that the goals of Title VII and the Civil Rights Act of 1991 to eradicate employment discrimination are fully realized. NELA submits this brief because of the importance of the issues at bar to furthering its goals. For these reasons, *amicus* respectfully request that the Court consider its views in support of the Respondent.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no person or entity other than the *amicus curiae*, and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Written consent to the filing of this brief has been obtained from the parties in accordance with Supreme Court Rule 37.3(a). Copies of the consent letters have been filed with the Clerk.

INTRODUCTION

The Civil Rights Act of 1991 embodies the intention of Congress to strengthen and improve laws redressing unlawful discrimination. In particular, the Act states that employers in mixed-motive cases will incur at least limited liability if an employee can prove that unlawful discrimination was a motivating factor for an employment practice. Petitioner urges reversal of the court below on the ground that the employee must use direct evidence to prove that unlawful discrimination was a motivating factor. However, nothing in the Act or the section in question limits proof to direct evidence. Grafting such a requirement onto this section would weaken rather than strengthen the civil rights laws.

SUMMARY OF ARGUMENT

This Court's analysis should begin with the Civil Rights Act of 1991. It was enacted "to strengthen and improve federal civil rights laws," not merely as a response to Supreme Court cases favoring the employer. This Act does not contain a requirement that an employee establish *through direct evidence* that unlawful discrimination was a motivating factor for an employment practice. Based on the plain meaning of Section 107(a) of the Act there is no requirement that proof must be limited to direct evidence.

The Civil Rights Act of 1991 evidences a strong intent by Congress that workplaces should be free of unlawful discrimination. A strong inference exists that Congress intended to create an incentive for employers to ensure that their workplaces avoid unlawful discrimination. Consequently, it appropriate for this Court to provide *Faragher* type guidance to employers.

The arguments made on behalf of Petitioner are not consistent with the Civil Rights Act of 1991. First, Justice

O'Connor's concurrence in *Price Waterhouse* does not control the instant matter. Second, there is no basis to construe the Civil Rights Act of 1991 narrowly. Third, fears of a greater liability rate are no basis to require direct evidence in mixed-motive cases. Finally, jury instructions can be crafted as needed to state correctly mixed motive law under the Civil Rights Act of 1991.

ARGUMENT

I. THIS COURT'S ANALYSIS SHOULD BEGIN WITH THE CIVIL RIGHTS ACT OF 1991

The statutory provision at the heart of this case is 42 U.S.C. §2000e-2(m). It provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 107(a) of the Civil Rights Act of 1991 added this provision. It was one of many fundamental changes to Title VII of the Civil Rights Act of 1964, resulting from the 1991 Act.

Petitioner has framed the question presented in terms of the "analysis set out in *Price Waterhouse v. Hopkins*." However, phrasing the question in that manner assumes that the *Price Waterhouse* statutory construction analysis was not superseded by the language of the 1991 Act. "[I]n every case involving the construction of a statute, [the Court's] starting point must be the language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Accordingly, a better way to phrase the question presented is: "Whether a plaintiff in a Title VII case must adduce direct evidence of discriminatory intent to

establish an unlawful employment practice as provided by Section 107(a) of the Civil Rights Act of 1991, codified as 42 U.S.C. §2000e-2(m)."

A. THE CIVIL RIGHTS ACT OF 1991 WAS ENACTED "TO STRENGTHEN AND IMPROVE FEDERAL CIVIL RIGHTS LAWS," NOT MERELY AS A RESPONSE TO SUPREME COURT CASES FAVORING EMPLOYERS.

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), certainly prompted the inclusion of section 107(a) in the 1991 Civil Rights Act. But the backdrop for this section and for the Act itself is much broader. Two primary purposes were stated for the Act:

> The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.

H.R. Rep. No. 40 (II), 102nd Cong., 1st Sess. 1991, 1991 U.S.C.C.A.N. 549, 1991 WL 87020 (Leg.Hist.) *1.

The preamble reflects the fact that the Civil Rights Act of 1991 is not just a reaction to *Price Waterhouse* and other Supreme Court employment decisions. The Act was intended to "amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws." PL 102-166, November 21, 1991, 105 Stat 1071. The Congressional findings further demonstrate that the scope of the Act is broader than the Supreme Court employment decisions which had recently preceded its enactment:

> The Congress finds that—
>
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
>
> (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Id. at §2. *See generally U.S. v. Turkette*, 452 U.S. 576, 588-89 (1981) (findings of RICO statute reflect the broad need for its enactment).

The first purpose listed for the Act is "to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace." The fourth listed purpose is "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." PL 102-166, November 21, 1991, 105 Stat 1071, §3. Consequently, section 107(a) should not be read merely as a reaction to the *Price Waterhouse* decision.

Compensatory and punitive damages are now part of the fabric of Title VII cases. This is because of the sweeping changes brought by the Civil Rights Act of 1991. PL 102-166, November 21, 1991, 105 Stat 1071, §102, *codified at* 42 U.S.C. §1981a. In 1989, when this Court's *Price Waterhouse* decision was issued, these remedies were not available. Another important development resulting from the Civil Rights Act of 1991 is the right to a jury trial in Title VII cases. *Id.* Previously, trials of all Title VII cases were decided by district court judges without a jury. In sum, the Civil Rights Act of 1991 effected changes

in federal civil rights law which are much broader than the Supreme Court cases which were addressed in the Act.

B. THE CIVIL RIGHTS ACT OF 1991 DOES NOT CONTAIN A DIRECT EVIDENCE REQUIREMENT FOR MIXED MOTIVE CASES.

The Civil Rights Act of 1991 provides employers an affirmative defense which limits the employee's remedies if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B). Nothing in the 1991 Act generally, or in section 107(a) particularly, requires that an employee establish through direct evidence that unlawful discrimination was a motivating factor. There is nothing in the Act or section 107(a) which even hints that Congress intended to limit proof of mixed-motive discrimination to direct evidence. Rather, the Act evidences an intent on the part of Congress to eradicate unlawful discrimination regardless of whether the evidence is circumstantial or direct.

It is well-settled that, when construing statutory provisions, courts must look first to the plain meaning of the statutory language. *E.g.*, *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

The meaning of section 107(a) is plain. Nothing in this section or the Act as a whole requires that a "mixed motive" be established by direct evidence. The Preamble, the Congressional Findings and Purposes of the Civil Rights

Act of 1991 Act are unambiguous; a primary purpose of the Act is to strengthen and improve civil rights laws. Therefore, there is no basis or reason to analyze or apply Justice O'Connor's concurring opinion in *Price Waterhouse*. That opinion pertains to a judicial interpretation of Title VII which was superseded by the 1991 Amendments. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851 (9th Cir. 2002) (*en banc* opinion). *See also Wolff v. Brown*, 128 F.3d 682 (8th Cir. 1997) (direct evidence not stated as requirement in mixed motive case).

Given the "sea-level" changes to Title VII of the Civil Rights Act of 1964, there is no basis to conclude that Congress intended to limit changes in the law pertaining to mixed motive cases only to cases where direct evidence is available. Congress *did not* write this requirement into the statute. Requiring the presentation of direct evidence in mixed-motive cases to establish that unlawful discrimination is a motivating factor for an employment practice is contrary to the Title VH of the Civil Rights Act of 1964, as amended and established Supreme Court precedent pertaining to the construction of statutes.

II. THE CIVIL RIGHTS ACT OF 1991 EVIDENCES A STRONG INTENT BY CONGRESS THAT WORKPLACES SHOULD BE FREE OF UNLAWFUL DISCRIMINATION.

A. THERE EXISTS A STRONG INFERENCE THAT CONGRESS INTENDED TO CREATE AN INCENTIVE FOR EMPLOYERS TO ENSURE THAT THEIR WORKPLACES AVOID UNLAWFUL DISCRIMINATION.

When a jury finds that employer's treatment of an employee is based on an unlawful motive, the employer has crossed a "threshold" and engaged in conduct explicitly prohibited by Congress. The 1991 Amendment provides

limited liability in such circumstances even if the employer shows that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. §2000e-5(g)(2)(B). Regardless of whether proof of unlawful discrimination is direct or circumstantial, the employer should take all necessary measures to keep its workplace free of unlawful discrimination. *See* CIVIL RIGHTS ACT OF 1990—Hon. Augustus F. Hawkins (Extension of Remarks—February 7, 1990) ("any reliance on prejudice in making employment decisions is illegal"). Affirming the court below will send a message to employers that proactive measures are needed to comply with all types of discrimination prohibited by Title VII, not just sexual harassment situations.

B. *FARAGHER* TYPE GUIDANCE FOR EMPLOYERS IS NEEDED.

The primary purpose of Title VII "is not to provide redress but to avoid harm." *Kolstad v. American Dental Ass'n.*, 527 U.S. 526, 545 (1999), *quoting Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). *Faragher* involved a sexual harassment situation which violated the sex discrimination provision of Title VII. The Civil Rights Act of 1991 does provide additional means of redress but the ultimate goal is to avoid and discourage unlawful discrimination.

Enforcing the plain language of section 107(a) of the Civil Rights Act of 1991 will encourage employers to take steps to ensure that employment practices are not infected with unlawful motives. Early warning programs should be in place regardless of whether proof an unlawful motive is by direct or circumstantial evidence. *See Faragher,* 524 U.S. at 806-07. Responsible employers will take advantage of preventive legal counseling offered by the management bar. As was the situation in response to *Faragher*, the management bar is likely to market these pro-active legal services to clients and potential clients.

III. ARGUMENTS MADE ON BEHALF OF PETITIONER ARE NOT CONSISTENT WITH THE CIVIL RIGHTS ACT OF 1991.

A. JUSTICE O'CONNOR'S CONCURRENCE IN *PRICE WATERHOUSE* DOES NOT CONTROL THE INSTANT MATTER.

Petitioner's reliance on Justice O'Connor's concurrence in *Price Waterhouse* is misplaced because that opinion addresses what is now a superseded statutory interpretation of Title VII. When *Price Waterhouse* was decided, Congress had not yet spoken to the "mixed motives" issue. Instead, this Court had the difficult task in *Price Waterhouse* of sorting out causation issues and assigning burdens of proof without much statutory guidance. The 1991 Amendment, in addition to establishing limited liability when unlawful discrimination is a motivating factor, changed the landscape of Title VII litigation. Title VII claimants now have the opportunity to seek compensatory and punitive damages from juries. Prior to the enactment of the Civil Rights Act of 1991, seeking such damages was not an option. Nor was a jury trial an option. In sum, because Title VII has changed significantly since *Price Waterhouse* was decided, Justice O'Connor's concurrence does not control the outcome of this matter.

B. THERE IS NO BASIS TO CONSTRUE THE CIVIL RIGHTS ACT OF 1991 NARROWLY.

The Equal Advisory Council's *amicus* brief (2003 WL 834711 at *17) argues that a "narrow interpretation" of the scope of the 1991 Amendment's changes is warranted, because "[n]o statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Merchants' Nat'l Bank*, 101 U.S. 557, 565 (1879). This argument is faulty

because *Shaw* involved the common law of bills of lading. Congress attempted to alter a long-standing common law doctrine by modifying the law with respect to bills of lading.

In contrast, *Price Waterhouse* is a judicial interpretation of what is now an outdated version of Title VII, which was first enacted in 1964. It is a statute with no common law antecedent. This Court has stated that "[s]ound rules of statutory interpretation exist to discover and not to direct the Congressional will." *United States ex Rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943). The Preamble, Congressional Findings, Purpose, and the specific changes provided by the 1991 Amendment make it elementary to discover the Congressional will: Congress wanted to strengthen and improve federal discrimination laws. Moreover, because the 1991 statutory language of section 107(a) of the Act is clear it is not even necessary to explore Congressional intent.

C. FEARS OF A GREATER LIABILITY RATE ARE NO BASIS TO REQUIRE DIRECT EVIDENCE IN MIXED MOTIVE CASES.

Petitioner argues that absent a direct evidence requirement to trigger the mixed-motive analysis, the burden of proof will be shifted to the employer in almost all cases. This argument is faulty because the employee must first prove that unlawful discrimination was a motivating factor for the employment action. Only then does the burden shift to the employer to show that the employment action would have occurred regardless of the unlawful discrimination.

The legislative history of the 1991 Amendment includes a statement that a Justice Department report indicated that plaintiffs had won almost 80 percent of the mixed-motives cases after the *Price Waterhouse* decision. H.R. Rep. No. 102-40, pt. 1, at 157-58 (1991) (minority views). However, very little information about these cases is provided in the legislative record. Because *Price Waterhouse* was

decided in 1989, only a relatively small sample of cases could have been gathered in the two years before the passage of the 1991 Act.

This Court should view the 1990 era Justice Department report with skepticism because more comprehensive recent studies have shown that employees seldom are victorious in court. One study found that between 1992 and 1998 employers prevailed in 93% of employment discrimination cases decided on the merits at the trial level and that employers prevailed in 84% of cases which were subsequently appealed. There was also some evidence in the study that employee victories were reversed at a greater rate on appeal. Michael Selmi, EMPLOYMENT DISCRIMINATION AND THE PROBLEMS OF PROOF: A SYMPOSIUM, *Why are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001). A report by the *Bureau of Justice Statistics Special Report: Civil Rights Complaints in U.S. District Courts, 1990-1998, available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc.pdf (3/26/2003), states that for civil rights cases, dismissals increased from 66% in 1990 to 71% in 1998.

Consequently, it appears that employers effectively use summary judgment procedures for cases arising under the Civil Rights Act of 1991. Regardless of whether there is a direct evidence requirement in mixed-motive cases, the employee still has the burden of proof to establish that unlawful discrimination is a motivating factor. The overall experience of the courts subsequent to the 1991 Amendment strongly suggests that summary judgment proceedings will continue to result in a large majority of dismissals of civil rights cases.

D. JURY INSTRUCTIONS CAN BE CRAFTED AS NEEDED TO STATE CORRECTLY MIXED MOTIVE LAW UNDER THE CIVIL RIGHTS ACT OF 1991.

The Civil Rights Act of 1991 creates challenges for Courts to fashion proper jury instructions correctly reflecting the law. This problem was inevitable once Congress authorized jury trials in Title VII cases. Courts, in putting together jury instructions, are dealing with statutory constructs with no common law antecedent. In *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), a case arising after the 1991 Amendment, this Court determined that the employee was entitled to a jury instruction on punitive damages. Justice O'Connor came to this conclusion after carefully construing 42 U.S.C. §1981a. *Id.* at 534-36. The Court's ruling in *Kolstad* provides guidance to lower courts in crafting Title VII punitive damages instructions and the review of those instructions by the courts of appeals. *See, e.g., Romano v. U-Haul Intern.*, 233 F.3d 655, 669 (1st Cir. 2000).

This Court has a similar opportunity to provide direction in the construction of jury instructions in mixed motive cases. The approach of the *en banc* majority below should be adopted. First, the trial court should analyze the evidence. If the court "determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination play *no* role at all in the employer's decision-making," then a mixed motive instruction should not be used. *Costa v. Desert Palace*, 299 F.3d 838, 856 (9th Cir. 2002) (emphasis added).

The mixed motive instruction provided by the *Costa* trial court is adequate. The essence of the instruction to the jury was that:

> If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated similarly even if the plaintiff's gender had played no role in the employment decision.

The instruction is proper because the first paragraph accurately summarizes the law as stated in 42 U.S.C. §2000e-2(m). Likewise, the second paragraph correctly summarizes the law as stated in 42 U.S.C. §2000e-5(g)(2)(B).

Wolff v. Brown, 128 F.3d 682 (8th Cir. 1997), also considered jury instructions in mixed motive cases. The Eighth Circuit stated that it was not plain error to give the following instructions:

> Your verdict must be for the Plaintiff . . . on Plaintiff's sex discrimination claim if all the following elements have been proved by a preponderance of the evidence: first, Defendant discharged Plaintiff; and second, Plaintiff's sex was a motivating factor in Defendant's decision. If either of the above elements has not been proved by a preponderance of the evidence, your verdict must be for the Defendant and you need not proceed further in considering this claim.
>
> If you find in favor of Plaintiff on his sex discrimination claim, then you must answer the following question in the Verdict Form: "Has it been proved

> by the preponderance of the evidence that Defendant would have discharged Plaintiff regardless of his sex?"

Id. at 684. The only problem with this instruction is that Mr. Wolff failed to object at trial that the instruction did not place the burden of proof on the employer to show that he would have been discharged regardless of his sex, as required by 42 U.S.C. §2000e-5(g)(2)(B). Consequently, the last sentence of the instruction should read:

> "Has Defendant proved by the preponderance of the evidence that it would have discharged Plaintiff regardless of his sex."

Finally, it has been suggested by *amici* who support Petitioner that jury instructions in mixed motive cases will be unwieldy in certain situations where age discrimination or section 1981 claims are brought with Title VII claims. While these combinations are certainly possible, the instant case is not one of them. The Court should wait to tackle these thorny issues when an appropriate case is presented for review.

CONCLUSION

In light of the clear purpose of the Civil Rights Act of 1991, *amicus* respectfully requests that this Court uphold the decision of the Ninth Circuit in favor of the Respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

DESERT PALACE, INC., dba
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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DESERT PALACE, INC., dba
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 65 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of Respondent with the consent of the parties as provided for in the Rules of this Court.[1]

[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. The burden of proof question in this case is directly addressed by two interrelated 1991 amendments to Title VII that were enacted in reaction to this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The first of these amendments provides that

> "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

And, the second goes on to provide that in a case where the plaintiff has "prove[n] a violation under section 2000e-2(m)," the employer has a limited affirmative defense to the remedies of reinstatement and backpay if the employer "demonstrates that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

The 1991 amendments define the operative term "demonstrates"—which describes both what is required of the plaintiff to prove a § 2000e-2(m) gender discrimination violation and what is required of the defendant to perfect a § 2000e-5(g)(2)(B) reinstatement/backpay defense—as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

Since § 2000e-2(m) and § 2000e-5(g)(2)(B) have a parallel structure and share in common the single operative term "demonstrates," that term must impose the same burden of proof on § 2000e-2(m) employee-plaintiffs and on § 2000e-5(g)(2)(B) employer-defendants, rather than imposing some qualitatively different or higher burden on one than on the other. And, by reason of the conventional litigation rules, which apply in Title VII cases as in civil cases generally, the

parties "meet[] the burdens of production and persuasion," in the ordinary contemporary meanings of those words, by proving their case through a preponderance of the evidence, both direct or circumstantial. *Infra*, pp. 4-10.

II. The Petitioner's argument is that a Title VII plaintiff can establish a violation under § 2000e-2(m) only by meeting a higher standard of proof of discriminatory motive that requires the plaintiff to present "direct evidence" consisting of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision." Pet. Br. 41. The Petitioner makes no attempt to do the impossible and square this heightened burden of proof requirement with the statutory language of the 1991 amendments. Instead, the Petitioner relies entirely upon Justice O'Connor's *Price Waterhouse* concurring opinion, which the Petitioner reads as contemplating the heightened burden of proof the Petitioner advocates.

There are three flaws in the Petitioner's argument. First, Congress in the post-*Price Waterhouse* 1991 amendments clearly embraced the conventional burden of proof rule that both a § 2000e-2(m) plaintiff and a § 2000e-5(g)(2)(B) defendant can prove their case by a preponderance of the direct or circumstantial evidence. Second, the fair reading of Justice O'Connor's opinion is that by using the term "direct evidence" she did *not* mean to endorse the higher "direct evidence" burden of proof requirement the Petitioner side attributes to her opinion. Third, the Petitioner side's higher "direct evidence" requirement is unsound in its own terms and, on that ground, should not be read into Justice O'Connor's *Price Waterhouse* concurring opinion and, by that route, into the Title VII law. *Infra*, pp. 10-20.

ARGUMENT

I. The Title VII[2] "burden of proof" question presented by this gender discrimination case is framed by the District Court's jury instructions and the petitioner-defendant Caesars Palace Hotel's objections to those instructions.

As we show, Congress has explicitly spoken to this question in Title VII's statutory language and has done so in terms that make it plain that the District Court's instructions correctly state the law.

A. The District Court began the jury instructions relevant here as follows:

> "The plaintiff [Catharina Costa] has the burden of proving each of the following by a preponderance of the evidence:
>
> 1. Costa suffered adverse work conditions; and
>
> 2. Costa's gender was a motivating factor in any such work conditions imposed upon her.
>
> "If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant." Pet. App. 32a-33a.

The district court then went on to further instruct the jury as follows:

> "You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's

[2] Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.

> treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> "However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision." Pet. App. 33a-34a.

Caesars Palace maintains that the District Court's second set of "burden of proof" instructions were erroneous because such instructions are proper only in those cases in which a gender discrimination plaintiff presents "direct evidence" consisting of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision,"[3]—or in the Government's formulation, "non-inferential evidence or evidence that on its face established the discriminatory motive"[4]—and Costa presented no such evidence.

B. Caesars Palace and its *amici curiae* speak at length of many things but barely mention and resolutely refrain from analyzing Title VII's language. That is not the proper way to proceed in any statutory case. "The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). And, it is particularly improper here, since Title VII speaks with unusual clarity to the particular dispute in this case.

[3] Pet. Br. 41 (citation and inserted enumeration omitted).

[4] Brief for the United States as *Amicus Curiae* Supporting Petitioner ("Gov. Br.") p. 28.

At the most basic level, Title VII makes it "an unlawful employment practice for an employer" to

> "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

In their turn, Title VII's basic remedial provisions go on to state that

> "[i]f the court finds that [an employer] has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ., the court may enjoin the [employer] from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer . . . responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-5(g)(1).[5]

In 1991, and in response to the "mixed motive" issue exposed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Congress amended the substantive provisions of Title VII to address the precise issue presented by this case. In this regard, the 1991 amendments provide that

> "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a* motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added).

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[5] While this case involves a Title VII claim against a defendant employer, that statute also prohibits discrimination by labor organizations. 42 U.S.C. § 2000e-2(c). Everything we say here about the burden of proof applies as well to Title VII claims brought against defendant unions.

The House Report on the 1991 amendments explains that this provision "overrules one aspect of the Supreme Court's decision in *Price Waterhouse*," by "clarify[ing]" that, once "the complaining party [has] demonstrate[d] that discrimination was a 'contributing' factor in an employment decision[,] . . . proof that an employer would have made the same employment decision in the absence of discriminatory reasons is relevant to determine not liability for discriminatory employment practices, but only the appropriate *remedy*." H.R. Rep. No. 40, 102d Cong., 1st Sess., Pt. 1, p. 48 (1991) (emphasis in original).

That being so, the 1991 amendments go on to provide that in a case where the plaintiff has "prove[n] a violation under section 2000e-2(m)," the employer has a limited affirmative defense that goes *not* to liability *vel non* but to the remedies of reinstatement and backpay. 42 U.S.C. § 2000e-5(g)(2)(B).[6] To perfect that defense, the employer must "demonstrate[] that [the employer] would have taken the same action in the absence of the impermissible motivating factor." *Id.*[7]

Of particular relevance here, the 1991 amendments define the operative term "demonstrates"—which describes both what is required of the plaintiff to prove her § 2000e-2(m) gender discrimination case and what is required of the defendant to perfect a § 2000e-5(g)(2)(B) reinstatement/backpay defense—as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

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[6] Section 2000e-2(m) was added by § 107(a) of the 1991 Act, and § 2000e-5(g)(2)(B) was added by § 107(b) of the 1991 Act. 105 Stat. at 1075-77. P.L. 102-166 § 107, 105 Stat. 1071, 1075-77 (Nov. 21, 1991).

[7] Even where the employer makes that showing, the court is authorized to "grant declaratory relief" and "injunctive relief" (other than reinstatement) and to award the successful plaintiff "attorney's fees and costs." 42 U.S.C. § 2000e-5(g)(2)(B)(i).

Since § 2000e-2(m) and § 2000e-5(g)(2)(B) have a parallel structure and share in common the single operative term "demonstrates," that term must impose the same burden of proof on § 2000e-2(m) employee-plaintiffs and on § 2000e-5(g)(2)(B) employer-defendants, rather than some qualitatively different or higher burden on one than on the other. *See Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'").

It is therefore very much to the point that under the "[c]onventional rules of civil litigation [which] generally apply in Title VII cases," the parties meet the burdens of production and persuasion by "prov[ing] their case by a preponderance of the evidence." *Price Waterhouse*, 490 U.S. at 253. Not surprisingly then, the House Report on the 1991 amendments confirms, for example, that under § 2000e-5(g)(2)(B), "the employer's burden is to establish 'by a preponderance of the evidence' rather than 'clear and convincing evidence' that it would have made the same decision in the absence of discrimination." H.R. Rep. No. 40, Pt. 1, p. 45 n. 39, quoting *Price Waterhouse*, 490 U.S. at 258.[8]

The "preponderance of the evidence" standard, of course, requires "[t]he trier of fact [to] consider *all* the evidence, giving it *whatever weight and credence it deserves,*" in order to determine whether the plaintiff has made out a case and also whether a defendant has made out an affirmative defense. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 771, 714 n. 3 (1983) (emphasis added). Thus, that standard

[8] *See* H.R. Rep. No. 40, Pt. 1, p. 48 ("[W]here the employer establishes that it would have taken the same action in the absence of any discrimination, a court may not order the employer to hire, reinstate, promote or provide back pay to the complainant.").

rests on – indeed, incorporates—the conventional rule of civil litigation providing that, "[a]s in any lawsuit, the [Title VII] plaintiff may prove his case by direct or circumstantial evidence." *Id.* "[D]irect evidence of a fact is not required" of a party precisely because "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence," *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960), and thus may be of equal or greater utility to the trier of fact. Indeed, in addressing "the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated," this Court observed that "circumstantial evidence [may be] probative of intentional discrimination" and "may be quite persuasive" in that regard. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 137 & 147 (2000).

Against this background, what follows directly from the statutory definition of the term "demonstrates"—giving the definition's words "meets the burdens of production and persuasion" their "ordinary, contemporary, common meaning"[9]—is this:

> • A Title VII gender discrimination plaintiff, like plaintiffs generally, establishes a § 2000e-2(m) unlawful employment practice by proving that "sex . . . was a motivating factor for [an adverse] employment practice" through "direct or circumstantial evidence" that "[t]he trier of fact [after] consider[ing] all the evidence," *Aikens*, 460 U.S. at 714 n. 3, finds to be a preponderance of that evidence; and
>
> • The defendant employer in such a case, like defendants generally, perfects his § 2000e-5(g)(2)(B) defense by proving that the employer "would have taken the same action in the absence of an impermissible motivating factor" through direct or circumstantial evidence

[9] *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 207 (1997) (internal quotation marks and citations omitted).

> that the trier of fact after considering all the evidence finds to be a preponderance of that evidence.

The 1991 amendments do not contemplate—and do not leave any room for—the imposition of any heightened burden of proof of the kind advocated by the Petitioner and its *amici curiae* on either the plaintiff or the defendant in a § 2000e-2(m)/§2000e-5(g)(2)(B) discrimination case.

II. Against the forgoing, the Petitioner and its *amici curiae* base their higher "direct evidence" burden of proof requirement—that a § 2000e-2(m) plaintiff can only prove that "sex . . . was a motivating factor for an [adverse] employment practice" through "statements by a decision-maker that directly reflect the alleged animus and bear on the contested employment decision," Pet. Br. 41, or, put in more general terms, through "non-inferential evidence or evidence that on its face establishes the discriminatory motive," Gov. Br. 28—on Justice O'Connor's *Price Waterhouse* concurring opinion.

In that opinion, Justice O'Connor endorsed *Price Waterhouse*'s holding "that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." 490 U.S. at 258. Justice O'Connor added, however, that "in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Id.* at 276.

The Petitioner side's reliance—and embellishment—on Justice O'Connor's "direct evidence" reference is trebly flawed.

First, and we submit dispositively, Congress in the post-*Price Waterhouse* 1991 amendments clearly embraced the

conventional burden of proof rule that both a § 2000e-2(m) plaintiff and a § 2000e-5(g)(2)(B) defendant can prove their case by a preponderance of the direct or circumstantial evidence. *See* pp. 4-10, *supra*.

Second—leaving aside the relevant statutory provisions and their meaning—Justice O'Connor did not state in terms what she meant by the phrase "direct evidence," and we believe that the fair reading of her opinion is that she did *not* mean the higher "direct evidence" burden of proof requirement the Petitioner side attributes to her opinion.

Third, and closely related to the second point, the Petitioner side's higher "direct evidence" requirement is unsound in its own terms and that requirement should not, on that ground, be read into Justice O'Connor's *Price Waterhouse* concurring opinion and, by that route, into the Title VII law.

In addressing the latter two points, we cannot improve on Judge Tjoflat's comprehensive and fully reasoned opinion in *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999), which analyzes the question "What constitutes 'direct evidence' of employment discrimination?" The pages that follow are therefore devoted to setting out the pertinent portions of his opinion to allow Judge Tjoflat's analysis to speak for itself.

(a) After reviewing the "means by which a plaintiff can prove impermissible [employment] discrimination," 187 F.3d at 1289, and "the well-established meaning [of 'direct evidence'] in the law of evidence," *id.* at 1293, Judge Tjoflat draws this lesson:

> "We are . . . presented with two possible definitions of 'direct evidence' in the law of employment discrimination. The first is the one that follows logically from the structure of employment discrimination law—namely, evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link

between an adverse employment action and a protected personal characteristic. We will refer to this definition as the 'preponderance' definition. The second is the traditional definition from the law of evidence—namely, evidence that, if believed, proves the existence of a fact in issue without inference or presumption. We will refer to this definition as the 'dictionary' definition." 187 F.3d at 1294.

Judge Tjoflat states the basis for the "preponderance" definition of "direct evidence" in the "structure of employment discrimination law," 187 F.3d at 1294, after this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972), as follows:

> "[A] plaintiff in an employment discrimination suit may proceed by one of two means: (1) *McDonnell Douglas*, or (2) direct evidence. [T]he *McDonnell Douglas* presumption is merely an evidence-producing mechanism that can aid the plaintiff in his ultimate task of proving illegal discrimination by a preponderance of the evidence. Consequently, if 'direct evidence' is the alternative to using *McDonnell Douglas*, the term would seem necessarily to mean evidence sufficient to prove, without benefit of the *McDonnell Douglas* presumption, that the defendant's decision was more probably than not based on illegal discrimination." 187 F.3d at 1293 (footnote omitted).

And, to put the discussion of the proper definition of "direct evidence" into sharper focus, Judge Tjoflat later clarifies what would constitute "direct evidence" of discrimination under the dictionary definition of that term:

> "Illegal discrimination means that the adverse employment action of which the plaintiff complains was based (at least in part) on an impermissible criterion, such as race, sex, or age. Thus, relevant evidence for proving illegal discrimination is evidence that demonstrates the state of mind of the employer (or, more concretely, the decisionmaker) at the time of the employment decision. The only 'eyewitness' to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic." 187 F.3d at 1294-95.

(b) In the end, Judge Tjoflat concludes:

> "The idea of 'direct evidence' has been a source of great confusion in employment discrimination law. After examining the cases on the topic and the legal framework within which the term is used, it is clear that direct evidence can mean nothing other than evidence from which a trier of fact could conclude, more probably than not, that the defendant discriminated against the plaintiff in regard to the contested employment decision on the basis of a protected personal characteristic." *Id.* at 1306.

And, in the heart of his *Wright v. Southland Corp.* opinion, Judge Tjoflat sets out the reasoned basis for that conclusion, which he summarizes as follows:

> "[T]he preponderance definition of direct evidence is supported by the intent of Congress in enacting anti-discrimination laws and the intent of the Supreme Court in creating the *McDonnell Douglas* presumption. In addition, the preponderance definition—unlike the dictionary definition—does not contravene the general evidentiary rule in federal courts that circumstantial and direct evidence are to be treated alike. Finally, the preponderance definition of direct evidence fits better than the dictionary definition with other principles of employment discrimination law." 187 F.3d at 1300.

Judge Tjoflat then proceeds by elaborating each of those points, and by noting that, on his reading, Justice O'Connor's

Price Waterhouse concurring opinion contemplates the preponderance definition and not the dictionary definition of "direct evidence."

(c) Given the posture of this case—and the Petitioner side's insistence that Justice O'Connor's *Price Waterhouse* concurring opinion contemplated the dictionary definition—we reverse Judge Tjoflat's order of presentation and turn first to his discussion of Justice O'Connor's opinion and then to his discussion of the points that call for a preponderance definition of "direct evidence." In the first of these regards Judge Tjoflat has the following to say:

> "[I]n *Price Waterhouse,* Justice O'Connor's concurrence relied upon a preponderance definition of direct evidence. The concurrence stated that the affirmative defense that the same decision would have been made in the absence of discrimination becomes relevant when the plaintiff has 'shown by direct evidence that an illegitimate criterion was a substantial factor in the decision.' *Price Waterhouse,* 490 U.S. at 276 (O'Connor, J., concurring in the judgment). Justice O'Connor goes on to define 'direct evidence' as 'evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status.' *Id.* at 278 (O'Connor, J., concurring in the judgment). This is obviously not the dictionary definition of direct evidence: Justice O'Connor explicitly states that the trier of fact is expected to 'draw an inference' of discrimination. Instead, Justice O'Connor's definition states that a plaintiff has presented direct evidence when a trier of fact could reasonably conclude that the contested employment action was caused by discrimination—essentially, a restatement of the preponderance definition of direct evidence." 187 F.3d at 1303 n. 18.

Simply stated, Judge Tjoflat's reading of Justice O'Connor's *Price Waterhouse* concurring opinion completely undermines the position of the Petitioner side, which rests entirely on the opposite reading of that opinion, and provides a more than sufficient basis for upholding the District Court's jury instructions here and for rejecting the Petitioner's objections to those instructions.

(d) Be the forgoing as it may, even putting Judge Tjoflat's reading of Justice O'Connor's *Price Waterhouse* concurring opinion to the side, his three part argument for an employment discrimination law "preponderance" definition of "direct evidence" over their higher "dictionary" definition calls for the preponderance definition.

(i) Judge Tjoflat begins by considering "the intent of Congress in enacting anti-discrimination laws and the intent of the Supreme Court in creating the *McDonnell Douglas* presumption":

> "[I]t is possible for an employer to discriminate on the basis of a protected personal characteristic in a manner that does not allow the victim of the discrimination to establish the *McDonnell Douglas* presumption. *** If direct evidence were to mean only evidence that proves discrimination without presumption or inference, then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.
>
> "The significance of this is two-fold. First, such a system would surely frustrate congressional intent. The purpose of employment discrimination law—as is clear from the plain language of the relevant statutes—is to prevent employment decisions based on certain protected personal characteristics. When such a decision

can be proven by a preponderance of the evidence, but the plaintiff nevertheless loses, congressional intent has been frustrated.

"Second, such a system would frustrate the purpose of *McDonnell Douglas*. *** If we were . . . to use the dictionary definition of direct evidence, we would, in some instances, be making the plaintiff's task more difficult than it would have been in the absence of *McDonnell Douglas*—namely, in the situation in which the plaintiff can prove discrimination by a preponderance of the (circumstantial) evidence, but cannot satisfy the requirements needed to establish the *McDonnell Douglas* presumption. *McDonnell Douglas* would thereby be turned on its head; a presumption that was designed to help plaintiffs would be the basis for a system that makes a plaintiff's task more difficult." 187 F.3d at 1300-01.

(ii) Judge Tjoflat then discusses the proper fit between an employment discrimination law "direct evidence" rule and the general federal rules of evidence:

"The Supreme Court has stated that courts should not 'treat discrimination differently from other ultimate questions of fact.' *Aikens*, 460 U.S. at 716. If we were to require non-circumstantial evidence to prove that a protected personal characteristic was the basis of an employment decision, we would be treating this factual question very differently from other ultimate questions of fact. As a general rule in the federal courts, direct and circumstantial evidence are not distinguished; all relevant evidence is to be considered in deciding a case. *Cf. Holland v. United States*, 348 U.S. 121, 139-40 (1954) (stating that, in criminal cases, circumstantial evidence is 'intrinsically no different from testimonial evidence'). This is true, for instance, in equal protection jurisprudence; determining whether a given state action was motivated by a discriminatory purpose requires an 'inquiry into such circumstantial and direct evidence of

intent as may be available.' *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). There is no rational reason why employment discrimination law should be an exception to this general rule, and any definition of direct evidence other than the preponderance definition would carve out such an exception. *See Aikens*, 460 U.S. at 714 n. 3." 187 F.3d at 1301.

(iii) Judge Tjoflat concludes his discussion with a three part demonstration of why the "preponderance definition of direct evidence is also the only logical definition when considered in the light of other tenets of employment discrimination law." 187 F.3d at 1301. In the first place:

"[T]he traditional framework for deciding civil cases is still (even after *McDonnell Douglas*) the appropriate framework for deciding employment discrimination cases. As the Supreme Court has said, the central focus in an employment discrimination case 'is always whether the employer is treating some people less favorably than others because of' a protected personal characteristic, and the *McDonnell Douglas* presumption is only one method of pursuing this inquiry. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (internal quotation omitted). Use of the dictionary definition of direct evidence creates the possibility that a plaintiff may be excluded from the traditional framework altogether; if a plaintiff cannot establish the *McDonnell Douglas* presumption and cannot present a certain type of evidence, then he will have no opportunity to prove discrimination. The preponderance definition, in contrast, assures that the central inquiry in an employment discrimination suit always will be whether the employer has impermissibly discriminated; under the preponderance definition, even if the plaintiff cannot establish the *McDonnell Douglas* presumption, he will still have the opportunity to attempt to prove discrimination by a preponderance of the evidence." 187 F.3d at 1301-1302.

In addition, as Judge Tjoflat observes:

> "[T]he law is clear that . . .once the employer has done what would be required of it if the plaintiff properly invoked *McDonnell Douglas*, the *McDonnell Douglas* presumption is no longer relevant. Under the preponderance definition of direct evidence, this rule makes sense. *** [F]ailure to establish the *McDonnell Douglas* presumption, under the preponderance definition of direct evidence, means only that the case will be treated like any other civil case—in other words, the plaintiff must present evidence sufficient to prove illegal discrimination by a preponderance of the evidence (but without the benefit of a proffered explanation from the employer). Therefore, if the employer has volunteered a nondiscriminatory reason for the contested employment action, the distinction between a *McDonnell Douglas* case and a direct evidence case breaks down, and the question of whether the plaintiff successfully established the *McDonnell Douglas* presumption becomes irrelevant. In contrast, under a dictionary definition of direct evidence, the rule that the *McDonnell Douglas* presumption becomes irrelevant once a legitimate, nondiscriminatory reason is volunteered by the employer is senseless. Under the dictionary definition, failure to establish the *McDonnell Douglas* presumption means that the plaintiff must prove improper discrimination without the benefit of any inferences by the trier of fact. *** This need for a separate inquiry [into whether the plaintiff had established the *McDonnell Douglas* presumption] simply does not fit with the rule that if the employer has articulated a legitimate, nondiscriminatory reason for the adverse employment action, it is irrelevant whether the plaintiff has properly established the elements needed to invoke the *McDonnell Douglas* presumption." *Id.* at 1302.

And, finally, as Judge Tjoflat states:

> "[T]he preponderance definition is consistent with the rule that if a plaintiff can prove improper discrimination

> by direct evidence, the defendant can nevertheless prevail [on remedy issues] by showing that the same employment decision would have been made absent the discriminatory motive. In other words, the argument that the same decision would have been made apart from discrimination operates as an affirmative defense. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 246 (1989) (plurality opinion). An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence. This understanding fits with the preponderance definition of direct evidence – if the plaintiff can prove discrimination by direct evidence (i.e., by a preponderance of the evidence), the defendant can nevertheless prevail if it can establish that it would have taken the same action in the absence of discrimination. In contrast, under the dictionary definition of direct evidence, the defendant's affirmative defense would come into play only when the plaintiff has presented a certain type of evidence, unlike any other affirmative defense known to the law." *Id.* at 1302-03 (citation & footnotes omitted).[10]

* * *

In sum, the term "direct evidence," as used in the "law of employment discrimination," means "evidence from which a reasonable factfinder could find, by a preponderance of the evidence, a causal link between an adverse employment action and a protected personal characteristic," 187 F.3d at 1294, with the clarification—to take into account the

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[10] For the reasons stated by Judge Tjoflat in the portion of his opinion quoted in text at pp. 17-19 above, the Government is mistaken in its assertion that the "settled case law defining the standards of proof and causation" in Title VII cases draws a rigid distinction between "*McDonnell Douglas* pretext cases, on the one hand, and . . . mixed-motive cases, on the other." Gov. Br. 21. That being so, the argument at Gov. Br. 19-21, that a "dictionary" definition of direct evidence is necessary in order to safeguard this distinction fails.

employment discrimination rule stated in *McDonnell Douglas*—that, as would be true in civil cases generally, such "evidence [must be] sufficient to prove [that link], without the benefit of the *McDonnell Douglas* presumption," *id.* at 1293.

CONCLUSION

The decision of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

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DBA CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

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AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters of consent of the parties to the filing of this brief have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions because of race, color, religion, sex or national origin.

In ATLA's view, freedom from illegal discrimination is fundamental to the enjoyment of all opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of the contributions which highly qualified individuals are capable of making. ATLA has the firm conviction that diversity in the workplace is essential both for the fulfillment of individual liberty, and to enable society to actualize its true potential.

SUMMARY OF ARGUMENT

The motivating factor standard codified in the Civil Rights of Act of 1991 relieved plaintiff of the necessity of proving that a discriminatory motive was a "but-for" cause or even a "substantial factor" for an adverse employment decision. It also enabled plaintiff to establish liability upon a showing that a protected characteristic was a motivating factor, allowing the defendant to escape damages and certain types of equitable relief only after satisfying its burden that it would have made the same decision even without consideration of the protected characteristic. The statute did not, however, relieve the plaintiff of the burden of proving discriminatory intent, nor did it attempt to regulate the method of proof or the type of evidence to be utilized. The plain

language of the statute is silent on the subjects of pretext, disparate treatment and direct evidence. The plain language of the statute fails to distinguish between cases involving a single motive or multiple motives. The motivating factor standard codified in the Civil Rights Act of 1991 is the only standard for proving a claim under Title VII of the Civil Rights of 1964. Neither the number of motives nor the existence of pretext or direct evidence makes any difference.

Nevertheless, relying upon the concurring opinion of Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Petitioner and the Government argue that the motivating factor standard codified in the statute only applies when plaintiff offers "direct evidence" that the adverse employment action was motivated by a protected characteristic. Justice O'Connor's concurring opinion, however, was not the controlling opinion in *Price Waterhouse*. Direct evidence is simply an additional method of proving discriminatory intent. The requirement of direct evidence as a prerequisite for the application of the motivating factor standard would obviate the historic understanding that direct evidence is no more probative than circumstantial evidence.

The Petitioner and the Government argue that the motivating factor standard codified in the statute applies only when there exist multiple motives for an adverse employment action which, they claim, is the rare exception. The plain language of the statute, however, does not limit its application to multiple-motive cases, and even if it did, multiple-motive or mixed-motive cases represent the vast majority, if not all, of cases litigated under Title VII. The

evidentiary framework of *McDonnell Douglas Corp. v. Green,* 711 U.S. 792 (1973), is not limited to proving discriminatory intent where there exists only a single motive for an adverse employment action. Even under the obsolete and more restrictive "a determining factor" (but-for) standard, it is clear that the application of *McDonnell Douglas* did not require proof that an illegal reason be the only reason for an adverse employment action.

The Petitioner and the Government also distinguish between so-called pretext cases and mixed-motive cases, and argue that the codified motivating factor standard does not apply to the former. They also appear to distinguish between disparate treatment cases (which they equate with pretext cases) and mixed-motive cases. A confusion of terminology and basic concepts has led to a confusion of the issues by the Petitioner, the Government, and lower courts.

Contrary to the position of the Petitioner and the Government, the valid comparison is not between pretext cases and mixed-motive cases. This is a false dichotomy. The number of motives or reasons for an adverse employment action is entirely unrelated to the concept of pretext. Pretext is simply one method of proving discriminatory intent. In proving pretext, the employee seeks to prove that the employer's articulated reason is an attempted coverup for the existence of an illegal motive. The inference of an illegal motive is created by proof that 1) the employer's articulated reason(s) is not the true reason(s) for an adverse employment action; 2) even if true, it did not motivate the adverse employment decision; *or* 3) that an illegal reason also motivated the adverse employment decision. So-called pretext

cases are not different types of cases from so-called mixed-motive cases. Regardless of the number of motives, plaintiff will often prove that a protected characteristic was a motivating factor by proving pretext. Plaintiff will also rely upon evidence of pretext to demonstrate that the employer would not have made the same decision.

Disparate treatment is simply one way but not the only way of proving pretext; that members of a protected classification are treated less favorably than others. Evidence of disparate treatment can relate specifically to the employer's articulated reason for adverse action or to unrelated employment practices.

Contrary to the assertions of the Petitioner and the Government, the evidentiary framework of *McDonnell Douglas* is not inconsistent with the motivating factor standard articulated in *Price Waterhouse* and qualified by the Civil Rights Act of 1991. They are two separate concepts. The shifting burdens of *McDonnell Douglas* provide an evidentiary framework for the purpose of proving discriminatory intent, that is, the existence of a discriminatory motive. The degree to which the discriminatory motive may have influenced the adverse employment action is relevant only to the issue of causation, which is not addressed by the *McDonnell Douglas* framework at all. The motivating factor standard, on the other hand, addresses the issue of causation and not intent.

Indeed, the Civil Rights Act of 1991 made it easier for Plaintiff to survive summary judgment because it eliminated Plaintiff's need to prove "but-for" causation and substituted the more lenient motivating factor standard. This is a Congressional

policy decision for which this Court may not substitute its judgment. Having survived summary judgment, the trial court can give only a motivating factor instruction because that is the only claim available. A proper jury instruction combined with special interrogatories will allow the jury the flexibility to distinguish between mixed-motive and single motive cases. Only in mixed-motive cases will the same decision affirmative defense become a relevant inquiry.

ARGUMENT

A. DIRECT EVIDENCE IS NOT A PREREQUISITE FOR THE APPLICATION OF THE MOTIVATING FACTOR STANDARD OF CAUSATION UNDER THE CIVIL RIGHTS ACT OF 1991.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Ann Hopkins was a senior manager in an office of Price Waterhouse when she was proposed for partnership in 1982. She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year. Although Plaintiff received outstanding evaluations and letters of recommendations, she was also accused of being abrasive and needed to improve on interpersonal skills. When the partners in her office later refused to repropose her for partnership, she sued Price Waterhouse under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* 490 U.S. at 231-32.

The trial court found that "[b]oth '[s]upporters and opponents of her candidacy,' indicated that she was sometimes overly aggressive, unduly harsh,

difficult to work with, and impatient with staff.'" *Id.* at 236. The trial judge also found, however, that some partners reacted negatively to Hopkins because she was woman. In particular, it was explained to Hopkins that in order to improve her chances at partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235.

The trial judge found "that Price Waterhouse legitimately emphasized interpersonal skills in its partnership decisions, and also found that the firm had not fabricated its complaints about Hopkins' interpersonal skills as a pretext for discrimination. Moreover, he concluded, the firm did not give decisive emphasis to such traits only because Hopkins was a woman . . . ." *Id.* at 236. Nevertheless, the trial judge decided that "some of the partners' remarks about Hopkins stemmed from an impermissibly cabined view of the proper behavior of women, and that Price Waterhouse had done nothing to disavow reliance on such comments." *Id.* at 236-37. The trial court found that the firm discriminated on the basis of gender, but could escape injunctive relief by clear cogent and convincing evidence that it would have made the same decision even without considering gender. *Id.* at 237. The Court of Appeals affirmed, but held that the same decision defense was a defense against all liability and not just equitable relief.

Writing for a plurality of four in *Hopkins*, Justice Brennan rejected the requirement that plaintiff prove "but-for" causation in order to establish liability under Title VII. 490 U.S. at 240. In order to satisfy the "because of" standard of

causation, plaintiff simply had to prove that an illegal motive was "a motivating factor" in the defendant's decision making process. *Id.* at 250-51. Title VII was intended to prohibit an employment decision which was tainted in any way by a discriminatory motive. "We take these words [because of] to mean that gender must be irrelevant to employment decisions. *Id.* at 240.

In reference to the type of evidence necessary to prove that a protected characteristic was a "motivating factor," the plurality stated "we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision, and we refrain from deciding here which specific facts, 'standing alone,' would or would not establish a plaintiff's case, since such a decision is unnecessary in this case." *Id.* at 251-252. The plurality also concluded that a defendant could nevertheless escape all liability if it could prove by a preponderance of the evidence that it would have made the same decision even without consideration of the protected characteristic. *Id.* at 242.

Justice White concurred in result. He differed with the plurality only concerning the specifics of the employer's burden. Relying upon *Mt. Healthy City Bd of Ed. v. Doyle*, 490 U.S. 274 (1977), Justice White rejected the "motivating factor" standard and concluded that in order to prove a violation of the statute, plaintiff must prove that the protected characteristic was a "substantial factor" in the decision making process. *Id.* at 258-260. In all other respects, Justice White agreed with the plurality that *Mt. Healthy* provided the proper framework for analyzing "mixed-motives" cases. 490 U.S. at 259. Conspicuously absent from Justice White's

concurring opinion is any passing reference to the type of evidence required. Specifically, nothing is said about the necessity of "direct evidence" as a prerequisite for invoking the so-called "mixed-motive" model.

Justice O'Connor also concurred. She concluded that "because of" intended to create a "but-for" standard of causation under Title VII. 490 U.S. at 262-63. She concluded that this standard of causation was satisfied by a finding that a discriminatory motive was a "substantial factor" in the decision making process. Only then would the burden shift back to the defendant to prove that it would have made the same decision even without consideration of the protected characteristic.

> It should be obvious that the threshold standard I would adopt for shifting the burden of persuasion to the defendant differs substantially from that proposed by the plurality, the plurality's suggestion to the contrary notwithstanding. *See* ante at 250, n.13. The plurality proceeds from the premise that the words "because of" in the statute do not embody any causal requirement at all. Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made "because of" the plaintiff's protected status. Only then would the burden of proof shift to the defendant to prove that the decision would have been justified by other, wholly legitimate considerations.

490 U.S. at 277-78 (O'Connor, J., concurring in judgment).

In addition, Justice O'Connor concluded that in order to shift the burden to the employer, the plaintiff must satisfy the substantial factor standard with direct evidence. "In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." 490 U.S. at 276.

Relying on *Marks v. United States*, 430 U.S. 188 (1977), Petitioner and the Government argue that Justice O'Connor's opinion constitutes the holding of the Court in *Hopkins*, because it constituted the "narrowest" ground of decision. But the direct evidence requirement was not adopted by the plurality or by Justice White. It was therefore not the narrowest ground for the decision and was not the controlling analysis.[2] Moreover, in support of

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[2] *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2nd Cir.), *cert. denied*, 506 U.S. 826 (1992) ("The requirement of 'direct evidence' was not, however, adopted either by the plurality of four or by Justice White, so there was not majority support for this proposition"); *Hyatt Corp. v. NLRB*, 939 F.2d 361, 374 n.5 (6th Cir. 1991)("it cannot be said with certainty that *Price Waterhouse* requires a Title VII plaintiff in a mixed-motive case to make a strong showing by direct evidence that discrimination was a substantial and motivating factor in an employment decision."); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997), as vacated in part on reh'g, 1998 WL 1988451 (D.C. Cir. Feb. 25, 1998) ("Justice O'Connor's concurrence was one of six votes supporting the Court's judgment . . . , so that it is far from clear that [it] should be taken as establishing binding precedent"); *Stacks v. Southwestern Bell Yellow Pages Inc.*, 996 F.2d 200, 201 n.1 (8th Cir. 1993) ("We conclude that there is no restriction on the type of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision").

the motivating factor standard of causation, a majority of Justices in *Price Waterhouse* relied upon *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), which does not restrict the type of evidence available to plaintiff. The evidence of a discriminatory motive in *Transportation Management* was characterized by the plurality in *Price Waterhouse* as follows:

> But the only evidence in that case that a discriminatory motive contributed to the plaintiff's discharge was that the employer harbored a grudge toward the plaintiff on account of the [the employee's] union activity; there was . . . *no direct evidence* that grudge played a role in the [employer's] decision [to fire the plaintiff]. . . .

490 U.S. at 257 (emphasis added).

In response to a series of Supreme Court decisions, Congress passed the Civil Rights Act of 1991, which amended Title VII of the Civil Rights Act of 1964. One of the decisions meant to be clarified was *Price Waterhouse v. Hopkins*, *supra*. With respect to *Price Waterhouse*, the amendment clarified that a Title VII violation is established through proof that a protected characteristic was "a motivating factor" in the employment action; the "substantial factor" standard articulated by Justices White and O'Connor was rejected. *See* Section 2000e-2(m). In addition, Section 2000e-5(g)(2)(B) provided that the employer's "same decision" evidence serves

as an affirmative defense with respect to the scope of remedies, not as a defense to liability.[3]

Statutory interpretation begins with the language of the statute. *See United States v. Ron Enters., Inc.*, 489 U.S. 235, 241 (1989). When the

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[3] In relevant part, the amended statute provides as follows:

> Employer practices. It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. § 2000e-2(a)(1).

> Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m).

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court - (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 2000e-5(g)(2)(B).

plain meaning of a statutory provision is unambiguous, that meaning is controlling. *Id.* at 242. Reliance on legislative history is not needed where the plain language of the statute is clear and unambiguous. There is a strong presumption that the plain language of the statute expresses congressional intent, "rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed." *Ardestani v. I.N.S.*, 502 U.S. 129, 135-136 (1991) (internal quotations and citations omitted); *United States v. Ron Pair Enters., Inc.* 489 U.S. 235, 242 (1989). The plain language of the Civil Rights Act of 1991 is entirely silent on the type of evidence necessary to support the motivating factor standard of causation. The statute's silence on the subject strongly supports the Ninth Circuit's conclusion that direct evidence is not required.

The American legal system has historically emphasized the probative value of evidence, rather than its type. *See* 1A John Henry Wigmore, EVIDENCE IN TRIALS AT COMMON LAW § 26, at 957 (Tillers rev. 1983). It is apodictic that strong circumstantial evidence may be much more probative than weak direct evidence, as when fingerprint or DNA evidence places a defendant at the scene of a crime while direct eye witness testimony from a near sighted person does not. *See Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy Concurring) ("I would reject, however, the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence. Circumstantial evidence may be as probative as testimonial evidence"). All juries are traditionally instructed that direct evidence is not entitled to any greater weight than circumstantial evidence. *E.g.* Model Ninth Circuit

Jury Civil Instructions, 1.5. Furthermore, requiring courts to distinguish between direct and circumstantial evidence will inevitably lead to confusion and subjective judicial judgments concerning the nature of the evidence which qualifies as "direct." As stated by the Ninth Circuit, "[t]he resulting jurisprudence has been a quagmire that defies characterization despite the valiant efforts of various courts and commentators." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 851-53 (9th Cir. 2002) (discussing different standards by different circuits and inconsistent ruling by panels of the same circuit). *See also* Michael Zubrensky, *Despite the Smoke, There Is No Gun: Direct Evidence in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 *Stanford L. Rev.* 959, 970-80 (1994) (recognizing the differing approaches to direct evidence within the circuits).

B. THE NUMBER OF MOTIVES FOR AN ADVERSE EMPLOYMENT ACTION IS NOT RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.

"In [single-motive] cases, the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision. In mixed-motive [multiple-motive] cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate." *Price Waterhouse,* 490 U.S. at 260 (White, J., concurring in the judgment). The Government argues that Section 2000e-2(m), which references "other factors also motivat[ing] the practice," demonstrates the Congressional intent to restrict application of the statute to only mixed-

motive cases. *See* Gov. Brief at 19. But this argument is entirely specious. The language of the statute does not allow for the application of the motivation factor standard *only* when other factors also motivated the practice. It applies *even though* or *regardless* of whether other factors motivate the practice. The clear Congressional intent was to establish the motivating factor standard recognized by the *Price Waterhouse* plurality, and to reject the substantial factor standard required by Justices O'Connor and White.

In addition, a limitation of Section 2000e-2(m) to mixed-motive cases, as argued by the Petitioner and the Government, would be no limitation at all since in virtually all Title VII cases there exists sufficient evidence for the jury to find mixed motives. In the large majority of cases, an employee will allege discrimination on the basis of a protected characteristic, and an employer will then articulate more than one legitimate reason for the adverse employment action at issue, *e.g.*, absenteeism and failure to meet a sales quota. The employee may attempt to rebut this evidence through either direct or circumstantial evidence.

The plaintiff may offer evidence of disparate treatment in reference to an employment practice unrelated to the articulated reason; *e.g.*, when the employer articulates failure to meet a sales quota and the employee demonstrates disparate treatment concerning attendance, training or overtime. The jury may then conclude that the failure to meet the sales quota is a true reason, but that the disparate treatment for an unrelated employment practice demonstrates that an illegal reason also played a part in the decision making process. Even where the

employee's evidence is limited to disproving the articulated reason, a fact finder still might rely upon other evidence in the record, but not articulated by the employer, as a reason for the adverse employment action. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 523 (1993) ("the defendant's 'articulated reasons' themselves are to be found 'lurking in the record'"). Under these circumstances, a fact finder may well conclude that the employer was motivated by an illegal reason *and* one or more of the employer's articulated or unarticulated reasons; mixed motives. In addition, where there exists more direct evidence of discriminatory intent, a fact finder may easily conclude that the articulated reason is true, but that the employer's own words reflect that an illegal reason was also a motivation. The probative value of direct evidence is completely unaffected by the number of motives.

Even a case litigated under a "but-for" standard of causation applying *McDonnell Douglas* has not traditionally been limited to only a single motive case. When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *See Price Waterhouse,* 490 U.S. at 241 (Brennan, J., plurality opinion) *citing* 110 Cong. Rec. 2728, 13837 (1964). Accordingly, in numerous cases, particularly under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, courts have routinely instructed juries that in order to prevail "age need not be the sole factor in the decision to terminate the plaintiff's

employment, but must be 'a determining factor' or 'make a difference.'"[4]

C. THE PROOF OF PRETEXT OR DISPARATE TREATMENT IS RELEVANT TO THE APPLICATION OF THE MOTIVATING FACTOR STANDARD.

The Petitioner and the Government argue that there exists a distinction between pretext and mixed-motive cases. It argues that the "other factors" phrase in Section 2000e-2(m) "belies any suggestion that a 'motivating factor' analysis was intended to apply to pretext as well as mixed-motive cases." *See* Gov. Brief at 19. But as the Ninth Circuit correctly

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[4] *E.g., Graham v. Dresser Industries Inc.,* 928 F.2d 408 (9th Cir. 1991)("To constitute an ADEA violation, age need not be the sole factor in the decision to terminate the plaintiff's employment, but must be "a determining factor" or "make a difference") (citing Ninth Circuit cases); *Golomb v. Prudential Insurance Co.,* 688 F.2d 547 (7th Cir. 1982)("We agree that a successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant-employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.,* 3 F.3d 1419, 1425 n.3 (10th Cir. 1993) (Recognizing a proper instruction under *McDonnell Douglas*: "In order to prevail on his first theory of unlawful age discrimination, 'disparate treatment,' each plaintiff must prove, by a preponderance of the evidence, that his age was a determining factor in defendant's failure to hire him. However, a plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age."); *Greene v. Safeway Stores, Inc.,* 98 F.3d 554, 557 (10th Cir. 1996)("To prevail on an ADEA claim, a plaintiff must prove that age was a determining factor in the employer's decision to terminate the plaintiff. The plaintiff need not prove that age was the sole factor behind his termination").

understood, pretext and mixed-motive cases are not different kinds of cases. 299 F.3d at 857.

The concept of pretext is entirely unrelated to the number of motives for an adverse employment action. Pursuant to Section 2000e-2(m), plaintiff has the burden of proving discriminatory intent; that a protected characteristic was a "motivating factor" in the employment decision. The employer will inevitably articulate a reason or reasons for its adverse employment decision, and the employee will attempt to demonstrate, one way or the other, that the articulated reason is simply a coverup for illegal discrimination.[5] Toward that end the employee will invariably offer evidence that the employer's reason is a pretext. In addition or in the alternative, the employee may offer evidence of pretext to rebut the employer's allegation that it would have made the same decision even without consideration of the protected characteristic.

In order to prove a coverup (pretext), the employee will attempt to demonstrate that 1) the articulated reason is false; 2) even if the reason is true it did not motivate the adverse employment decision; *or* 3) even if the reason did motivate the decision, an illegal reason also played a part in the decision making process. There are no limitations on the type of evidence that an employee can offer for the purpose of proving a coverup for illegal discrimination. Employees often offer evidence of

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[5] "In short, on the retrial, respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were, in fact, a *coverup* for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805 (emphasis added).

disparate treatment; that similarly situated employees were treated differently than those within the protected class. They may offer evidence that the articulated reason by the employer was unworthy of belief. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-48 (2000). In addition, they may offer either more direct evidence or other circumstantial evidence which demonstrates that the employer was also motivated by an illegal reason. [6]

D. THE *MCDONNELL DOUGLAS* FRAMEWORK APPLIES TO THE MOTIVATING FACTOR STANDARD OF CAUSATION CODIFIED IN SECTION 2000E-2(M).

The Petitioner and the Government argue that there exists a difference between the *McDonnell Douglas* evidentiary framework and the so-called mixed-motive framework established by Section 2000e-2(m). They argue that Section 2000e-2(m) applies only to mixed-motive cases, which require direct evidence, but that so-called "pretext" cases require the application of the *McDonnell Douglas*

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[6] In most cases, the evidence of disparate treatment is not restricted to the employer's articulated reason – it embraces many unrelated employment practices to demonstrate that the employer treats those in a protected classification differently than those who are not within a protected classification. In those cases, the fact finder is free to conclude that the employer did not treat the employee differently than others in reference to the articulated reason, and that the reason offered by the employer is true. Nevertheless, because the employer generally treats others more favorably than those within a protected class, the fact finder is free to conclude that the employer was also motivated by an illegal reason. In other words, that the employer had mixed motives.

framework. Indeed, the dissenting opinion in the lower court emphatically asserts that the mixed motive analysis is a departure from *McDonnell Douglas* because *McDonnell Douglas* requires proof of pretext and that a mixed motive analysis does not:

> Mixed motives analysis is a departure from the well-established *McDonnell Douglas* framework. Whereas *McDonnell Douglas* requires the plaintiff to make a pretext showing once an employer puts forth evidence of legitimate nondiscriminatory reasons for the challenged employment practice, mixed motive analysis allows a plaintiff to prevail even when she cannot prove pretext.

Costa v. Desert Palace, Inc., 299 F.3d 838, 867 (9th Cir. 2002) (Judge Gould, dissenting). The dissent even argues that the elimination of the direct evidence requirement would effectively overrule *McDonnell Douglas*. *Id.* These arguments are all specious and reflect a limited understanding of the differences and purposes of "mixed motives" and the *McDonnell Douglas* evidentiary framework.

Title VII prohibits employers from discriminating against employees "because of" race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). The *McDonnell Douglas* evidentiary framework is designed to assist the Court in determining the existence of an illegal motive. Under *McDonnell Douglas*, the prima facie case "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "We presume these acts, if otherwise unexplained, are more likely than not based on the

consideration of impermissible factors." *Id.* (citation and internal quotation marks omitted).

Once Plaintiff establishes a prima facie case, the burden of production shifts to the defendant, who must articulate through admissible evidence one or more reasons for the adverse employment decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). Thereafter, the burden of shifts back to the plaintiff to introduce evidence from which the factfinder could conclude that a discriminatory motive influenced the employer's decision despite its articulated reason. "[Plaintiff] may succeed . . . either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000). If a plaintiff proves that the defendant's explanation is "unworthy of belief," the finder of fact may, but need not, infer the existence of a discriminatory motive. *Reeves*, 530 U.S. at 147-48. "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine, supra,* at 253; *accord Reeves, supra,* at 143.

The Civil Rights Act of 1991 has done nothing to change plaintiff's long standing burden of proving intentional discrimination. *McDonnell Douglas* is one useful method, but not the only method, of proving that an illegal motive played at least some part in the employment decision. Once plaintiff has demonstrated that an illegal motive played a part in the employer's decision, plaintiff has proven a

violation of Section 2000e-2(m), and the issue of causation then becomes relevant: to what degree did the illegal motive influence the employer's decision? The Civil Rights Act of 1991 establishes the standard for answering that question. It addresses only the subject of causation. It did not eliminate "but-for" causation, it merely shifted the burden to the employer to demonstrate that it would have made the same decision even without considering the protected characteristic. If the defendant succeeds in doing so, it avoids damages and certain types of equitable relief.

The *McDonnell Douglas* framework is not obsolete, as asserted by the dissenting opinion in the lower court. *McDonnell Douglas* continues to be a viable method of demonstrating the existence of a discriminatory motive. In order to survive summary judgment, plaintiff still must prove that the employer's articulated reason for the adverse action is a pretext, that is, a coverup for illegal discrimination. This can be achieved by demonstrating a triable issue of fact that 1) the articulated reason(s) is false; 2) even if the articulated reason(s) is true, that the reason did not motivate the adverse employment decision; *or* 3) even if the articulated reason(s) is true, an illegal reason also played a part in the decision making process. Any of these three methods will suffice to prove that the employer's articulated reason is a cover up for an illegal reason. The *McDonnell Douglas* framework does not address the issue of causation. It only addresses the issue of discriminatory intent. In that regard, the number of motives is irrelevant.

E. THE *MCDONNELL DOUGLAS* FRAMEWORK DOES NOT APPLY TO JURY INSTRUCTIONS. JURIES SHOULD BE INSTRUCTED CONSISTENT WITH THE MOTIVATING FACTOR STANDARD IN ALL CASES.

The McDonnell Douglas framework primarily is a device to assist the court at the summary judgment stage of the proceeding, and was never intended to be utilized as a jury instruction.

> All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. . . . But none of this means that [courts] should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation in deciding this ultimate question.

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715 (1983). As the Court explained, "at this stage, the *McDonnell-Burdine* presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity'"), *citing Burdine,* 450 U.S. at 255 n.10. As a consequence, the applicability of the *McDonnell Douglas* framework has no bearing on jury instructions. [7]

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[7] *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) ("*McDonnell Douglas* was not written as a prospective jury charge; to read its technical aspects to a jury, as was done here, will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to

The Petitioner and the Government complain that applying the "motivating factor" standard of causation will allow Plaintiff to much more easily survive summary judgment. They are both correct but for different reasons than they assert.

Prior to the Civil Rights Act of 1991, plaintiff had to create a triable issue of fact concerning the existence of a discriminatory motive *and* that the illegal motive was a "but-for" cause of the adverse employment action. The Civil Rights Act of 1991, however, requires only that plaintiff create a triable issue of fact that an illegal motive existed and that it influenced the adverse action *to any degree*. The methods of proof and types of evidence to be utilized by plaintiff have not changed. Having satisfied this burden, summary judgment must be denied unless no disputed factual issue exists on the employer's same decision affirmative defense.[8] Although the

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seize upon poorly understood legalisms to decide the ultimate question of discrimination"); *Messina v. Kroblin Transportation Systems, Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("the presumption and burdens inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury on the merits. . . . [T]he important issue is discrimination vel non not the orderly presentation of evidence"); *Berndt v. Kaiser Aluminum*, 789 F.2d 253, 257 (3rd Cir. 1986) (Once directed verdict is denied, it is unnecessary to decide if plaintiff established a prima facie case); *Cunningham v. Housing Authority of Opelousas*, 764 F.2d 1097, 1100 (5th Cir.), *cert. denied* 474 U.S. 1007 (1985) ("Once the case has been fully tried, the need to analyze each separate function of the *McDonnell-Burdine* analysis 'drops from the case'").

[8] Where dismissal turns upon an affirmative defense, the defendant has the burden of proof. In such cases "[t]he issue is not whether [defendant] had produced sufficient evidence to establish the defense but whether it was entitled to judgment as a matter of law, *i.e.*, whether no reasonable jury could fail to

Petitioner and the Government may be displeased at the prospect of plaintiff's diminished burden, this is a Congressional policy judgment for which this Court may not substitute its judgment.

Contrary to the ruling of the Ninth Circuit, juries should be instructed to determine whether a protected characteristic was a "motivating factor" in all cases.[9] The distinction recognized by the Ninth Circuit between single-motive and multiple-motive cases is illusory. As explained above, a jury could readily find that all cases are multiple-motive cases. In addition, Congress has determined that within the meaning of Title VII the term "because of" contained in Section 2000e-2(a)(1) means a "motivating factor." *See* Section 2000e-2(m). If the jury finds that an illegal motive was not a motivating factor in the employment decision, the case is over and the employer wins. If the jury finds that an illegal motive was a motivating factor, plaintiff has succeeded in proving liability, but the

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find that the defense had been established." *Snell v. Bell Helicopter Textron, Inc.*, 107 F.3d 744, 746 (9th Cir. 1997). Thus, the motion must be resolved in Plaintiff's favor unless the defendant can show that, resolving all facts in favor of Plaintiff, no reasonable jury could reject its affirmative defense. *Id.*

[9] The Ninth Circuit ruled that jury instructions should differ depending upon whether there exists a single motive or multiple motives for an adverse employment action. According to the Ninth Circuit, where the evidence supports a single motive for the adverse employment action, either the legitimate reason or the illegal reason but not both, the jury should be instructed to determine whether the illegal reason was "because of" the protected characteristic. Where the jury could find multiple motives, however, the jury should be instructed to determine whether the protected characteristic is a "motivating factor." *Costa*, 299 F.3d at 856-57.

jury must determine if a legitimate factor also influenced the employer's decision. If the jury determines that it did not, then plaintiff is entitled to full damages. If the jury decides that legitimate factors did influence the employer's decision, the jury must determine whether the employer would have made the same decision even without consideration of the protected characteristic. If the jury answers no to this third question, then plaintiff is awarded full damages. If the jury answers yes, then plaintiff is entitled to no damages, but may be awarded attorney fees and limited equitable relief.[10] These were precisely the instructions given in this case.

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[10] Title 42 U.S.C. § 2000e-5(g)(2)(B) provides that where plaintiff proves a violation of § 2000e-2(m) and the employer demonstrates that it would taken the same action, "the court - (i) *may* grant declaratory relief, injunctive relief . . . and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title." (Emphasis added). The Circuits are split concerning the availability of fees under this section. The majority of Circuits which have decided the issue appear to follow *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996), which holds an award of fees is discretionary and the court should "consider the relationship between the fees and the degree of the plaintiff's success," which will ordinarily result in no fee at all. *Id.* at 1336. *See also Akrabawi v. Carnes Co.*, 152 F.3d 688, 695-97 (7th Cir. 1998) ("We agree with *Sheppard's* analysis of the statute and we believe the list of factors is a good starting point for a court deciding whether to award attorney's fees under sec. 2000e-5(g)(2)(B)"); *Canup v. Chipman-Union*, 123 F.3d 1440, 1442-43 (11th Cir. 1997) (affirming district court's denial of attorneys' fees to employee who jury found would have been fired for having an affair with a subordinate); *Norris v. Sysco Corp.*, 191 F.3d 1043, 1051 (9th Cir. 1999) ("Perhaps in the long run, *Gudenkauf's* 'ordinarily' will rarely yield a result different from *Sheppard's* 'proportionality,' but to the extent it would, we are satisfied that *Sheppard* states the correct rule"). *But see Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1081 (10th Cir. 1998) ("we conclude that recovery of damages is not a proper factor upon which to assess the propriety of granting a fee award in a mixed-motive case. Moreover, we agree with the district court that, as under section 2000e-5(k), a plaintiff who prevails under section 2000e-2(m) should ordinarily 'be awarded attorney's fees in all but special circumstances'"); *Garcia v. City of Houston*, 201 F.3d 672, 679 (5th Cir. 2000) (applying a mix of *Sheppard* factors and *Gudenkauf* considerations in favor of an award of 25% of the fees requested).

CONCLUSION

For these reasons, the ruling of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC. DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF ANN B. HOPKINS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF ANN B. HOPKINS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*[1]

Ann Hopkins was the respondent in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII case. The Court held that she had proved that gender-based stereotypes played a substantial, motivating role in Price Waterhouse's refusal to admit her to the partnership in 1983; this meant that the firm could avoid liability only by proving that it would have made the same decision—partnership denial—for lawful reasons in a bias-free setting. The Court also ruled that Price Waterhouse must make the requisite showing by preponderant evidence and remanded on that issue, since the lower courts had applied a clear and convincing evidentiary standard.

The case had been tried before Judge Gerhard Gesell as *Hopkins v. Price Waterhouse*, 618 F.Supp. 1109 (D.D.C. 1985), and it came to this Court after the District of Columbia Circuit affirmed Judge Gesell's finding of liability, 825 F.2d 458 (D.C. Cir. 1987). Following remand from the Court, Judge Gesell applied the preponderance of the evidence standard and again found Price Waterhouse liable under Title VII for its denial of partnership to Ms. Hopkins. He ordered the firm to admit her as a partner, at the same level of compensation as if she had been admitted in 1983. 737 F.Supp. 1202 (D.D.C. 1990). The D.C. Circuit affirmed, 920 F.2d 967 (D.C. Cir. 1990), and Ms. Hopkins (who had been constructively discharged) returned to Price Waterhouse as a partner in February 1991. She retired in 2002 after a

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. Counsel for *amicus curiae* certifies that this brief was not written, in whole or part, by counsel for a party, and that no person or entity, other than *amicus curiae* and counsel, made a monetary contribution to the preparation or submission of the brief. Supreme Court Rule 37.6.

successful career as a partner on the management consulting side of the business.

Ann Hopkins is the only person ever admitted to partnership under Title VII by judicial order. She remains committed to the principles established by her case, including those relating to stereotyping, proof of violation, and strong and meaningful relief. She regularly lectures on her experience seeking to become a partner at Price Waterhouse, most recently in February 2003 at the Peter F. Drucker Graduate School of Management at Claremont Graduate University, and in March at the Georgetown University Law Center. And she chronicled her experience in a well received book, *So Ordered: Making Partner the Hard Way* (University of Massachusetts Press, 1996).

Ms. Hopkins tells her audiences that companies will continue to have serious problems defending EEO actions until diversity becomes a core value of management. It always was on her watch.

STATEMENT

1. *Introduction.* The task in this case is to determine the circumstances giving rise to a jury instruction on dual motivation. The *en banc* decision of the Ninth Circuit, Petitioner's Appendix (Pet. App.) 1a, said that circumstantial evidence could trigger such an instruction, while most other courts of appeals have favored direct evidence. In fact, a preoccupation with the nature of the evidence—direct or circumstantial—is not helpful in assessing whether a dual motivation instruction should be given in a particular case. Instead, it makes more sense to see if the factual situation is one which is likely to produce a mix of motives.

In general, mixed motives are likeliest to arise in situations in which the decision-maker is influenced by someone acting from bias. In such circumstances, there may well be lawful influences too, so the ultimate decision is the product of both permissible and impermissible motives. That was exactly the

situation in *Price Waterhouse v. Hopkins*, where both biased and unbiased partners influenced the firm's decision-making body, its Policy Board. It was the nature of the decision-making process in *Price Waterhouse*, more than the type of evidence on which Ann Hopkins relied, that justified dual motivation treatment in that case. This remains true today.

2. *Factual Background.* Petitioner Desert Palace, Inc., which does business as Caesars Palace, appealed following an adverse jury verdict from the district court's denial of its motion for judgment as a matter of law under Rule 50, F.R.Civ.P. In such circumstances, a court "should review all of the evidence in the record." It "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." The court must also "disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000). This Statement views the record from respondent Catharina Costa's perspective, as *Reeves* requires.

Costa worked as a forklift operator in the warehouse at Caesars Palace in Las Vegas from 1987 to 1994, when she was fired. Pet. App. 55a-56a. A member of the Teamsters, she was the only woman in the bargaining unit. *Id.* at 56a. There is no dispute either that she was a capable worker, or that she was subjected to discipline throughout her seven-year tenure. *Id.* at 3a.

At trial, Costa presented evidence that her harsh treatment—including the denial of overtime assignments as well as frequent discipline, culminating in her firing—was the result of her gender. For example, she testified that men who arrived to work late were given overtime to make up for the lost time, while she was written up whenever she was tardy (one minute in one case). In similar fashion, Costa was disciplined for missing work for medical reasons; men were not. Only Costa was reprimanded when a number of employees—all the rest men—were eating soup in the office

on a cold day. And she was disciplined for profanity and for allegedly hazardous operation of equipment, while nothing happened to men who engaged in such conduct. Pet. App. 3a-4a.

It was undisputed that Costa received less overtime than the men. When she asked why one man was being preferred, she was told that he "has a family to support." Pet. App. 5a.

Costa's evidence showed that Caesars declined to act when co-workers subjected her to raw, sex-linked commentary. Most egregious, Costa was suspended for three days after complaining that a co-worker called her a "fucking cunt," ostensibly because she had provoked him into using this crude epithet. Pet. App. 5a-6a.

There was also evidence that the company viewed Costa through the prism of sexual stereotypes, for example calling her "strong willed" and "opinionated" and "confrontational," although there was testimony that she generally got along well with people. And the official who approved Costa's termination, herself a woman, said that she wanted to "get rid of that bitch." Pet. App. 5a.

Costa was fired after an altercation with another employee, a man who was angry with her and who had sought her out. He found her in an elevator in the warehouse. Costa testified that he attacked her and shoved her against the elevator wall, bruising her arm. Her testimony was believable, in part because she had reported the incident in detail immediately after it happened. In addition, photographs documented her bruises, and a witness reported seeing the man blocking the elevator door. In contrast, the man did not report the incident contemporaneously, and his later statements about it were contradictory. He initially denied, for example, that anything physical had occurred, then later said that Costa had hit him. Pet. App. 6a.

Caesars chose not to believe Costa. Instead, the company fired her. The man in question was given a five-day suspension. Pet. App. 6a-7a.

At trial, Costa contended that she was fired because of her sex, in violation of Title VII. Caesars defended by saying that the firing was justified by Costa's disciplinary record and was not the product of sex-based bias. Following the close of testimony, the district judge instructed the jurors that, to find for Costa, they had to determine both that she had been subjected to adverse actions on the job, and that her gender was a "motivating factor" in the taking of these actions. Joint Appendix (JA) 32-33 (Instruction No. 8). Caesars did not object to this instruction.

The judge also instructed the jurors that Caesars was liable if they found that sex discrimination was a motivating factor in Costa's treatment (including her firing), even if they found that her treatment was also motivated by a lawful reason; but the judge said that no damages should be awarded to Costa if Caesars proved that it would have taken the same actions anyway for lawful reasons. JA 33 (Instruction No. 9). Caesars objected to the giving of this or any instruction suggesting the possibility of dual motivation, but the company did not object to the formulation of the instruction itself ("I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction"). JA 18. As Caesars notes, Costa did not request Instruction No. 9. Brief for Petitioner at 8 n.4.

The jury specially found that Costa's gender was a motivating factor in Caesars' treatment of her, that the treatment was motivated by both her gender and by lawful reasons, but that Caesars did not prove that the same decisions would have been made in the absence of discrimination. JA 40. The jury awarded Costa some $64,000 in financial loss, $200,000 in compensatory damages for nonpecuniary loss (later reduced to $100,000 on

remittitur), and $100,000 in punitive damages (later vacated by the court of appeals). *Id.* at 41. The monetary awards are not at issue here.

SUMMARY OF ARGUMENT

This case explores the factors needed to trigger mixed motive analysis under Title VII. In addressing this issue, the courts of appeals have generally focused on the type of evidence offered by the plaintiff—direct or circumstantial—with most favoring direct evidence (variously defined). This approach is misguided, because a dual motivation test relying on direct evidence (however defined) yields results that are both over- and under-inclusive. That is, there are cases involving direct proof—even "smoking guns"—in which an instruction on dual motivation is not appropriate. Conversely, such an instruction is justified in some cases built entirely on circumstantial (*i.e.*, inferential) evidence.

It is a mistake to focus solely on the *type* of evidence adduced by the plaintiff—direct, circumstantial or a combination of the two—in considering the circumstances warranting a dual motivation instruction. More important are the roles of the actors who made, or influenced, the personnel decision challenged by the plaintiff.

1. Most Title VII cases scrutinize the motives of the person who actually made the decision in question (which may not necessarily be the person with formal decision-making authority). Some cases, however, concentrate on the person (or people) who influenced the decision-maker, although they did not themselves make the decision. If these "agents of influence" harbored a discriminatory motivation—and if the actual decision-maker relied on their views—then the ultimate decision is the product of bias. This is what happened in *Price Waterhouse v. Hopkins*, where the firm's Policy Board—which made the decision rejecting Ann Hopkins' candidacy for partnership—relied on the views of partners that were grounded in gender-based stereotype.

As in *Price Waterhouse*, such situations may well involve lawful as well as unlawful motives, since the actual decision-maker may also have relied on nondiscriminatory factors, and it may be difficult to determine the dominant motive (assuming that a single motive dominated). Hence an instruction on dual motivation is often proper where a biased "agent of influence" plays a role in a shaping the decision.

2. The typical, garden variety Title VII case focuses on the motives of the decision-maker himself (as opposed to a biased "agent of influence"). And here a dual motivation instruction is *not* appropriate, even if the evidence of the decision-maker's bias is direct and palpable. This is because cases focusing on the actual decision-maker are usually suitable for treatment under the "pretext" model, *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and they almost always devolve into a choice between two ostensibly dominant motives—one unlawful, the other lawful. The logic of *Burdine* compels just such a choice. If in these circumstances the jury rejects the defendant's story and finds that it is merely a pretext for discrimination, the defendant is not entitled to a "second bite at the apple" to argue that it would have made the same decision anyway in the absence of bias.

3. Today, following enactment of the Civil Rights Act of 1991, an instruction on dual motivation has two components: (1) a statement that the plaintiff will establish liability by proving that prohibited bias was a "motivating factor" in the personnel decision at issue, even if lawful factors also motivated the decision, *see* 42 U.S.C. § 2000e-2(m), and (2) a statement that the defendant can avoid damages by proving that the same decision would have been made for lawful reasons in an unbiased setting, *see* 42 U.S.C. § 2000e-5(g)(2)(B).

Many courts assume that a dual motivation instruction invariably benefits the plaintiff, and that plaintiffs will strive

to secure such an instruction. This is not so. Given the 1991 Act, the first component in a dual motivation instruction does not aid the plaintiff, because it sets forth the liability standard under Title VII generally, not just in mixed motive cases; indeed, the same language appears in instructions explaining pretext analysis under *Burdine*. And the second component of the instruction on dual motivation plainly benefits the *defendant*—not the plaintiff—because it provides an escape hatch to avoid the imposition of damages even though liability has been established. In this regard, Caesars Palace's brief is bereft of any explanation showing how the company was prejudiced by the instruction challenged here.

I. TITLE VII'S TWO PROOF MODELS

Catharina Costa challenged a number of discrete "adverse work conditions" at Caesars Palace, of which the most significant was her firing. Following the close of evidence at trial, the district court instructed the jury—without objection—that Costa had the burden of proving that her "gender was a motivating factor in any such work conditions imposed upon her." JA 33.

The court also gave an instruction on dual motivation:

> You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.
>
> However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly

> even if the plaintiff's gender had played no role in the employment decision.

JA 33. Caesars agreed that this was "a reasonable statement of the mixed motive instruction," JA 18, but objected to the jury's being instructed at all on dual motivation. JA 17-18.

Mixed motive analysis constitutes one of the two principal models of proof in cases of intentional discrimination (or disparate treatment) under Title VII. It is necessary to understand the operation of both models in order to discern the boundary between them.

A. The Pretext Model and the Single Dominant Motive

The "factual inquiry" in a case of disparate treatment arising under Title VII is "'whether the defendant intentionally discriminated against the plaintiff.' * * * In other words, is 'the employer . . . treating "some people less favorably than others because of their race, color, religion, sex, or national origin."'" *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (citations omitted).

In light of this "factual inquiry," disparate treatment cases focus on the motivation animating the challenged conduct. On infrequent occasions, there is a "smoking gun" revealing that the employer acted for a discriminatory reason. Guns rarely smoke, however, so the Court has developed a framework for handling the type of proof more typically seen in Title VII litigation. First, the plaintiff employee must establish a prima facie case of discrimination; the defendant employer must then respond by articulating a lawful reason for the challenged conduct; and finally the plaintiff has the opportunity to prove that the articulated rationale is not the defendant's true reason but is instead a "pretext" for bias. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 509

U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

The Court has over the years refined the original *McDonnell Douglas* model. Thus *Burdine* clarified that the defendant's burden in responding to a prima facie case is one of production, not proof. 450 U.S. at 254. And *Hicks* and *Reeves* explained that "the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff," but that "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-47 (emphasis in original).

It is sometimes suggested that the *McDonnell Douglas/Burdine* method of analysis applies only to indirect, circumstantial proof. This is not so. The Court has recognized that plaintiffs may at times be able to marshal evidence that more directly reflects a discriminatory motive, and the pretext model can accommodate such proof. In particular, a plaintiff who establishes a prima facie case

> must have the opportunity to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this *either directly by persuading the court that a discriminatory reason more likely motivated the employer* or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine, 450 U.S. at 256 (emphasis added).

In fact, the record in many Title VII (and other EEO) cases consists of circumstantial evidence coupled with snippets of more direct proof. In *Reeves*, for example, which arose under the Age Discrimination in Employment Act, the plaintiff elicited evidence showing that the actual decision-maker responsible for his firing was a man named Chesnut. 530

U.S. at 152. Substantial circumstantial evidence strongly suggested that the firing was the product of age bias. Id. at 142, 151-52. In addition, there was also evidence that more directly reflected Chesnut's bias. In this regard, the plaintiff said that "Chesnut had told him that he 'was so old [he] must have come over on the Mayflower' and, on one occasion when petitioner was having difficulty starting a machine, that he 'was too damn old to do [his] job.' " 530 U.S. at 151. The Court found this evidence significant, ruling that the Fifth Circuit had "failed to draw all reasonable inferences in favor of" the plaintiff when it "acknowledg[ed] 'the potentially damning nature' of Chesnut's age-related comments [but] discounted them on the ground that they 'were not made in the direct context of [the] termination.'" 530 U.S. at 152.

Many cases, like *Reeves*, are a hybrid of direct and circumstantial evidence. Yet, as *Reeves* shows, the pretext model of proof developed in *McDonnell Douglas* and *Burdine* is still the appropriate vehicle for analysis, even with direct evidence in the picture.

The genius of *Burdine* is not so much that it deals with circumstantial evidence, but rather that it "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination," 450 U.S. at 255 n.8, and channels "the factual inquiry . . . to a new level of specificity," *id.* at 255, in which the plaintiff's prima facie showing of bias is pitted against the employer's plausible nondiscriminatory rationale. In the end, the trier of fact (typically a jury) "must decide which party's explanation of the employer's motivation it believes." *Aikens*, 460 U.S. at 716.

This type of binary analysis is possible in most Title VII cases, whether or not direct evidence is involved. Even if the plaintiff produces a smoking gun—for example, a witness who claims to have overheard the new boss say that "I fired him because I can't stand blacks"—the boss will likely deny that he ever uttered anything of the sort and will swear that he

had a valid reason for the firing. The jury must decide whom it believes, and the decision is up or down.

B. Mixed Motive Analysis: *Price Waterhouse v. Hopkins* and the Civil Rights Act of 1991

Not every case fits neatly in the *Burdine* box, and *Price Waterhouse v. Hopkins* did not. This was not because Ann Hopkins produced direct evidence of bias, but rather because *Burdine* focuses on the truth or falsity of the reasons articulated by the decision-maker. And the decision- making body in *Price Waterhouse* was the firm's governing Policy Board, whose members could honestly recite seemingly valid reasons for rejecting Hopkins, based on the information available to them, in particular the comments of partners.

In these circumstances, Hopkins prosecuted her case by focusing less on the motives of the decision-makers themselves—the members of the Policy Board—than on the attitudes of the partners who influenced the Board. In the end, "Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments." 490 U.S. at 256. This type of proof did not fit the *McDonnell Douglas/Burdine* mold, since it did not impeach the credibility of the reason for partnership denial articulated by the Policy Board—reliance on partners' comments—but rather showed that the comments themselves were infected with forbidden bias.

Hopkins did not seek to prove that *all* criticisms of her were the product of stereotype, and Judge Gesell expressly found that some were based in fact. Hence the Policy Board necessarily considered both lawful and unlawful factors in

making its decision. This was the archetype of the "mixed motive" or "dual motive" case.[2]

Noting the presence of lawful as well as discriminatory motives, Price Waterhouse argued that liability under Title VII is fixed only if the plaintiff shoulders the entire burden of proving that the unlawful motive was the "but for" cause of the challenged personnel decision. The Court rejected that approach, holding that liability is also established where the plaintiff proves that discrimination was a "substantial factor" (or "motivating part") in the decision, and where the defendant does not then prove that the same decision would have been made in an unbiased setting. *See* 490 U.S. at 244-45 (plurality opinion); *id.* at 259 (White, J., concurring in judgment); *id.* at 265 (O'Connor, J., concurring in judgment).

In short, the Court did not insist on miracles from plaintiffs caught up in a tangle of lawful and unlawful motives. Instead, it recognized that "Ann Hopkins had taken her proof as far as it could go." 490 U.S. at 273 (O'Connor, J.). This was not sufficient to impose liability, but it was enough to shift the burden to Price Waterhouse to prove that it would have made the same decision in the absence of

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[2] In one sense, all Title VII cases involve mixed motivation, because a person's actions are rarely animated by a single motive. But usually it is possible, using the *Burdine* formula "progressively to sharpen the inquiry," 450 U.S. at 255 n.8, to narrow the field to a choice between two dominant motives—one unlawful, the other lawful. "Mixed motive" is a term of art describing those situations in which the type of either-or analysis contemplated by *Burdine* is not appropriate. *See Price Waterhouse*, 490 U.S. at 247 (emphasis in original):

> the premise of *Burdine* is that *either* a legitimate *or* an illegitimate set of considerations led to the challenged decision. To say that *Burdine's* evidentiary scheme will not help us decide a case admittedly involving *both* kinds of considerations is not to cast aspersions on the utility of that scheme in the circumstances for which it was designed.

discrimination. And if the firm could not carry that burden, liability would be established.

The Civil Rights Act of 1991, Pub.L. 102-166, 105 Stat. 1072, embodied the Congressional response to a number of the Court's decisions, and "§ 107 [of the Act] respond[ed] to *Price Waterhouse v. Hopkins*." *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994). As amended by § 107, Title VII now provides that liability is established upon a showing that an impermissible reason was a "motivating factor" in an employment decision, "even though other factors also motivated" it. 42 U.S.C. § 2000e-2(m). Relief is limited, however, if the employer can prove that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). Given this change in the law, the proof that Ann Hopkins adduced would today establish a violation of Title VII, and the best that Price Waterhouse could hope for would be to avoid damages and other specific relief by meeting the "same decision" test.

II. A DUAL MOTIVATION INSTRUCTION SHOULD BE GIVEN IN CASES WHERE THE *BURDINE* MODEL IS INAPPLICABLE AND WHERE THE JURY CAN FIND FOR THE PLAINTIFF WITHOUT REJECTING THE DEFENDANT'S NONDISCRIMINATORY EXPLANATION. THESE ARE MOST LIKELY TO BE SITUATIONS IN WHICH THE DECISION-MAKER ACTS AS THE "CAT'S PAW" FOR THE BIAS OF ANOTHER.

Caesars Palace argues that an instruction on dual motivation should be given only in cases in which the plaintiff has elicited direct evidence of discrimination, ostensibly grounding this argument on Justice O'Connor's concurring opinion in *Price Waterhouse*. In fact, Justice O'Connor's opinion is not nearly as narrow as Caesars

contends. In any event, the issuance of a dual motivation instruction should not depend on the presence or absence of direct evidence, because a direct evidence test is both over- and under-inclusive.

A. Direct Evidence Is Neither Sufficient Nor Necessary for a Dual Motivation Instruction

Before giving instructions to the jury, the district court must decide, as a matter of law, whether *Burdine's* assumption of a contest between two dominant motives—one lawful, the other not—plausibly encompasses the evidence presented at trial. *See Price Waterhouse*, 490 U.S. at 247 n.12 ("[a]t some point in the proceedings . . . the District Court must decide whether a particular case involves mixed motives"); *id.* at 278 (O'Connor, J.) ("[o]nce all the evidence has been received, the court should determine whether the *McDonnell Douglas* or *Price Waterhouse* framework properly applies to the evidence before it").

If the *Burdine* pretext model fairly governs the evidence, then an instruction on dual motivation should not be given. If not—if the operation of multiple motives is a plausible reading of the record—then the jury should be instructed accordingly. A focus on direct evidence, even assuming an agreed-upon definition, is not helpful in making this assessment.

Assume, for example, the case hypothesized above in which the plaintiff has presented proof of bias that meets the strictest, narrowest definition of direct evidence—a "smoking gun" in the form of a co-worker's testimony that he heard the new boss say, "I fired him because I can't stand blacks." The boss denies making the statement and says he fired the plaintiff because of attendance problems. This would seem to present the jury with a classic binary choice—whom do you believe?—and would easily fit into the *Burdine* model, in which the plaintiff can prevail "directly by persuading the

court that a discriminatory reason more likely motivated the employer." 450 U.S. at 256.[3]

There is no reason to believe that *both* lawful and unlawful motives were at work in the situation described. This being so, it would be inappropriate for the court to instruct the jury on dual motivation. To do so would prejudice the *plaintiff* by giving the employer a "second bite at the apple to show that it would have taken the same action anyway." *Jones v. Washington Metropolitan Area Transit Authority*, 946 F.Supp. 1011, 1017 (D.D.C. 1996), *aff'd in part and vacated in part*, 205 F.3d 428 (D.C. Cir. 2000). Defendants who lose under *Burdine* based entirely on circumstantial evidence do not get a second chance; a defendant felled by a smoking gun should fare no better.

In sum, the presence of direct evidence is not a sufficient basis for an instruction on dual motivation. Nor is it necessary.

Imagine a situation, akin to *Price Waterhouse*, in which a manager acknowledges placing great weight on the recommendations of his foremen when making promotion decisions. A woman was a recent candidate. The foremen generally rated her as well qualified, but some gave muted but legitimate criticism of one area in which she lacked experience. In addition, one of the foremen was harshly negative. In the end, the manager decided against promoting the female candidate. He acknowledged her superior qualifications but felt that the few mild criticisms of her experience, coupled with the harsh overall criticism from one foreman, could not be overcome.

The woman sues. She does not contest the criticism of her experience, but she says that alone should not have doomed

[3] A plaintiff who produces direct evidence of this nature is not required to establish all the elements of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

her candidacy. And she argues that the foreman who was her most strident critic is biased against women. She can offer no evidence directly reflecting gender-based animus—no sexist comments, for example. But she shows that this particular foreman has never recommended a woman for promotion, although he had upwards of twenty opportunities to endorse qualified female candidates. His record also shows that he disciplined women more harshly than men for similar offenses. As in *Reeves*, 530 U.S. at 151, there was an "'obvious difference' in how [the foreman] treated" the men and women under him.

There is a mix of motives in this situation. The manager who rejected the plaintiff's candidacy relied on *both* the legitimate but mild criticisms of her experience, as well as the harsh—and illegitimate—views of one foreman. The either-or choice assumed by *Burdine* is not applicable here. In these circumstances, dual motivation analysis should be employed, and it should not fail for want of sexist commentary by a man who is quite clearly predisposed against women. *Price Waterhouse v. Hopkins* makes this clear.

In *Price Waterhouse*, some of the partners who commented on Ann Hopkins as a candidate for partner used unmistakably sexist language, for example calling her "macho" or saying she should take "a course at charm school." 490 U.S. at 235. And her boss told her that she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* But there were also "gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her." *Id.* An expert witness, Dr. Susan Fiske, testified that conditions that foster stereotyping were present in the selection process for partner, including "Hopkins' uniqueness (as the only woman in the pool of candidates) and the subjectivity of the evaluations." *Id.* at 236. Fiske believed that the sharply critical but gender neutral comments, as well as those that were overtly sexist, were the

product of stereotype. *Id.*[4] In the end, "[t]he trial judge acknowledged that it was impossible to measure the precise role sexual stereotyping had played in the Policy Board's decision to deny Hopkins partnership, but found that the decision was in fact tainted by discriminatory evaluations." *Hopkins v. Price Waterhouse*, 825 F.2d 458, 464 (D.C. Cir. 1987).

This was the record before this Court. However this proof may be characterized, it did not meet the strict definition of direct evidence, *i.e.*, "evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993). Several types of inferences were necessary in *Price Waterhouse*. For example, the district court had to infer that some of the suspect comments, especially those that were facially neutral, were related to Ann Hopkins' sex. More broadly, the partners who harbored stereotypes based on gender did not admit that they were lobbying against Hopkins because she was a woman; inference was needed here as well. Most pointedly, Price Waterhouse did not admit that comments grounded on stereotype were a substantial factor in the decision to deny partnership to Hopkins. The court had to infer this, too.

All these inferences were easy to draw. They were strongly supported, if not compelled, by the evidence. But they were nevertheless inferences—*conclusions* drawn from the record:

> Certainly a plausible—and, one might say, inevitable—*conclusion* to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the

[4] Dr. Fiske was at Carnegie Mellon University when *Price Waterhouse* was tried in 1985. She now teaches at Princeton and is currently serving as President of the American Psychological Society.

> comments that were motivated by stereotypical notions about women's proper deportment.

490 U.S. at 256 (emphasis added).

Caesars Palace purports to base its argument on Justice O'Connor's opinion concurring in the judgment in *Price Waterhouse*, which frequently uses the term "direct evidence." That opinion, however, is more supple than Caesars suggests, and it understood the inferential nature of the district court's reasoning. Thus Justice O'Connor accepted the D.C. Circuit's characterization of the evidence: "Ann Hopkins proved that Price Waterhouse 'permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner.'" 490 U.S. at 272 (citation omitted). Of course, this was a conclusion drawn from the record—an inference—but it met Justice O'Connor's test:

> Under my approach, the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could *draw an inference* that the decision was made "because of" the plaintiff's protected status.

Id. at 278 (emphasis added).

Immediately before this passage, Justice O'Connor employed an alternate formulation of this test: "What is required is *what Ann Hopkins showed here*: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." 490 U.S. at 277 (emphasis added). In context, then, Justice O'Connor's opinion is not dismissive of inferential (*i.e.*, circumstantial) evidence, but it insists on proof that *directly* ties the impermissible criterion to the employment decision at issue.[5]

[5] *See Thomas v. National Football League Players Ass'n*, 131 F3d 198, 204 (D.C. Cir. 1997) ("[i]n our view, Justice O'Connor's invocation of 'direct' evidence is not intended to disqualify circumstantial evidence nor

The second hypothetical sketched above passes muster here. That is, the strong evidence of the foreman's bias against women may be circumstantial in nature, but it is tied directly to the decision to deny a promotion to the female plaintiff. This evidence is "sufficient to show that an illegitimate criterion was a substantial factor in the particular employment decision such that a reasonable factfinder could draw an inference that the decision was made 'because of' the plaintiff's protected status." 490 U.S. at 278 (O'Connor, J.). Under Title VII today, as amended by § 107 of the Civil Rights Act of 1991, liability is established. 42 U.S.C. § 2000e-2(m). And since both lawful as well as unlawful motivations substantially influenced the promotion denial—*i.e.*, the mild but legitimate criticisms of a number of foremen, and the harsh, discriminatory views of one—an instruction on dual motivation would be warranted, so that the company could have a chance to avoid damages by proving that promotion would have been denied even had the biased foreman refrained from commenting at all. 42 U.S.C. § 2000e-5(g)(2)(B).

B. The Proper Basis for a Dual Motivation Instruction

Casting a net of direct evidence over mixed motives captures both too much and too little. Circumstantial evidence may be used in proving a case involving both lawful and unlawful motives. Conversely, direct evidence (however defined) will not necessarily yield a factual situation warranting an instruction on dual motivation.

As noted above (n.2), virtually every case in fact involves more than a single motive, because most people act for a

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to require that the evidence signify without inference. In context, the notion of 'direct' evidence in Justice O'Connor's concurrence means only that the evidence marshaled in support of the substantiality of the discriminatory motive must actually relate to the question of discrimination in the particular employment decision").

variety of reasons. Nevertheless, it is usually possible to employ *Burdine's* razor to hone the evidence, so that the jury is presented with a choice between two dominant motives—one lawful, the other not. So the first question to be faced, in deciding whether an instruction on dual motivation should be given, is whether *Burdine's* pretext model can comfortably accommodate the evidence. In most cases, it can. But not always. And the cases that are likeliest to involve an ungainly mixture of lawful and unlawful motives are those, like *Price Waterhouse*, that involve an arguably biased person who influences the decision-maker.

In *Shager v. Upiohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the Seventh Circuit held that a company is liable where the decision-maker acts "as the conduit of [a subordinate's] prejudice—his cat's-paw." *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 542, 562 (1998) (citing *Shager* for the proposition that "the employer was still liable because the [decision-maker] functioned as the supervisor's 'cat's-paw'"). Most courts of appeals have adopted the same analysis.[6]

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[6] *See Griffin v. Washington Convention Center*, 142 F.3d 1308 (D.C. Cir. 1998) (citing *Shager* and ruling, "we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence"); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Rose v. New York City Bd. of Ed., C.S.D. No. 13*, 257 F.3d 156, 162 (2d Cir. 2001); *Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995); *Russell v. McKinney Hospital Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Simpson v. Diversitech General, Inc.*, 945 F.2d 156, 160 (6th Cir. 1991), *cert. dismissed*, 502 U.S. 1083 (1992); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998), *cert. denied*, 528 U.S. 930 (1999).

Although the Court did not use the metaphor, *Price Waterhouse* was a classic "cat's-paw" case, and it shows why such cases may not be susceptible to *Burdine* treatment and hence may require a dual motivation instruction. As noted above, Price Waterhouse's Policy Board made the decision on Ann Hopkins' candidacy. Still, individual partners played a pivotal role; they were "agents of influence" who supplied most of the information on which the Policy Board based its decision, and much of this information was biased. Hence the Policy Board "functioned as the . . . 'cat's-paw'" of the biased partners. *Ellerth*, 524 U.S. at 562. But not all the information available to the Policy Board was tainted in this fashion, so the Board ended up with lawful as well as unlawful reasons for rejecting Hopkins, making the *Burdine* model inapplicable.

In *Price Waterhouse*, there was a mix of motives that could not be teased into an either-or choice. This will generally be true in "cat's-paw" cases. An instruction on dual motivation is appropriate in such cases, regardless of the type of evidence in the record. It is essential, though, that the proof establish a direct connection between the biased influence and the challenged decision. *Price Waterhouse*, 490 U.S. at 277-78 (O'Connor, J.).

Something analogous to the "cat's-paw" situation may arise where the evidence shows that an employer maintains a systemic policy or practice of discrimination. If so, the trier of fact will be warranted in believing that the decision-maker was influenced by the discriminatory policy. Here again, however, there may be evidence that other, lawful motives were at play in a particular decision. If so, a dual motivation instruction is appropriate here as well, so that the defendant can have the opportunity to limit relief by proving that the same decision would have been made in the absence of the discriminatory policy. In fact, this is what typically happens in a class action, after class-wide liability has been established. Relief will not be granted to an individual class

member if the defendant can prove that the individual "was denied an employment opportunity for legitimate reasons." *Teamsters v. United States*, 431 U.S. 324, 362 (1977).

A recent, vacated decision of a panel of the Fourth Circuit, *Hill v. Lockheed Martin Logistics Management, Inc.*, 314 F.3d 657 (4th Cir. 2003), *pet. for rehearing en banc granted and opinion vacated* (Feb. 12, 2003), illustrates these principles. The plaintiff, a female sheet metal mechanic, alleged that her safety inspector was biased against women in general, especially older women, and against her in particular, several times calling her a "useless old lady" and other variations on that caustic theme. *Id.* at 660. At Lockheed, three written reprimands could lead to termination; the plaintiff already had one, which was legitimate, but she charged that her inspector trumped up the last two, resulting in her firing by others. *Id.* at 660-62.

The panel majority believed that the plaintiff had "proffered considerable evidence" to show that the biased inspector "had a substantial influence on Lockheed's decision to fire her." 314 F.3d at 671. This was sufficient to warrant mixed motive treatment under Fourth Circuit law, which requires a plaintiff to produce " 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision' . . . [i]n other words . . . 'evidence that clearly indicates a discriminatory attitude at the workplace and . . . illustrate[s] a nexus between that negative attitude and the employment action.'" *Id.* at 665 (citations omitted). And the panel noted that it was using "the term 'direct evidence' to refer to evidence, be it direct or indirect, that is of sufficient strength to warrant use of the mixed-motive framework." *Id.* n.3.

The dissenting judge employed the same analytical framework as the majority. But he believed that liability should not be imposed "for the discriminatory motives of a subordinate employee simply because that employee has

played a role, even a significant one, in the process that led to the employment decision." 314 F.3d at 693. Rather, "the plaintiff should be required to present evidence that the subordinate was the 'actual decisionmaker,' or the one 'principally responsible,' for the decisions." *Id.* He also thought that the inspector's "statements may well have evidenced a discriminatory attitude towards [the plaintiff] because of her age and sex, but the statements did not 'bear directly on the contested employment decision.'" *Id.* at 697 (citation omitted).

For present purposes, the relevance of *Hill v. Lockheed* lies not so much in whether the majority or dissent had the better analysis (although the dissent's insistence on an "actual decisionmaker" is contrary to *Price Waterhouse*, where the biased partners who commented on Hopkins' candidacy were *not* the decision-makers, formal or otherwise). Instead, what matters is that both the majority and the dissent in *Hill* were asking the right questions about the role of the purported "agent of influence" in the firing decision and the connection between his bias and that decision.

It is also significant that *Hill* was a "cat's-paw" case, exactly the type in which *Burdine* analysis might prove wanting. On the majority's view of the record, the plaintiff—having shown that the biased inspector had substantially influenced the decision to fire her—"had taken her proof as far as it could go." *Price Waterhouse*, 490 U.S. at 273 (O'Connor, J.). And this was sufficient to impose liability under 42 U.S.C. § 2000e-2(m)—and so, at an appropriate point in the proceedings, to warrant an instruction on dual motivation.

III. A DUAL MOTIVATION INSTRUCTION WILL OFTEN BENEFIT A DEFENDANT, AND IT BENEFITED CAESARS HERE

In its brief, Caesars Palace warns that, unless this Court acts, floodgates will open and "almost every plaintiff will opt

for [mixed motive] analysis in order to shift the burden of proof on causation to the employer." Brief for Respondent at 29. This assertion ignores an inconvenient circumstance: Costa did not request the dual motivation instruction given by the district court, and the instruction benefited Caesars, not Costa. In fact, one of the more remarkable features of this case is Caesars Palace's utter inability to demonstrate any prejudice flowing from the instruction it challenges.[7]

The district court gave two, partially overlapping instructions on motivation, Nos. 8 and 9. *See* JA 32-33. Instruction No. 8, to which Caesars did not object, said that the plaintiff had the burden of proving that her "gender was a motivating factor" in the adverse work conditions that were the subject of her complaint. That was an accurate statement of Title VII's liability standard.

Following passage of the Civil Rights Act of 1991, in particular § 107 of the Act, it is clear that a Title VII plaintiff can establish liability even if she does not show that discrimination was the dominant cause of the decision under challenge, but she must prove that it was a motivating factor. This is now the liability standard in all disparate treatment cases. *See Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("employers now violate [Title VII] when [an impermissible motive] plays an actual role in an employment decision, regardless of other considerations that may independently explain the outcome"); *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1350 (7th Cir. 1995) ("under Title VII, as amended by the 1991 Act . . . [a]

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[7] The Solicitor General is also alarmist. But in *Price Waterhouse*, the Solicitor General acknowledged that *defendants* are usually responsible for suggesting "multiplicity of motives." Brief for United States at 12 *in* No. 87-1167. In this regard, the United States defends far more Title VII cases than it prosecutes, and the government *as defendant* has requested dual motivation instructions. *See* discussion below of *Porter v. Agency for International Development*, 240 F.Supp.2d 5 (D.D.C. 2002).

violation . . . is established if a plaintiff can prove by a preponderance of the evidence that discrimination was a motivating factor in the employment decision"); *Borgo v. Goldin*, 204 F.3d 251, 255 n.6 (D.C. Cir. 2000) ("[i]n 1991, Congress overturned *Price Waterhouse* in part, amending Title VII to provide that once a plaintiff proves discrimination to have been a motivating factor, liability is established").

In a case tried under the pretext model, which typically presents the trier of fact with a choice between two dominant motives—one unlawful, the other lawful—a plaintiff who prevails will necessarily satisfy the "motivating factor" test. That is, the jury will have decided that prohibited bias was the dominant factor (if not the sole motivation) causing the challenged decision, so it was necessarily a motivating factor.[8]

The first paragraph of the challenged instruction (No. 9) simply amplified No. 8, saying that, "[i]f you find that the plaintiff's sex was a motivating factor in the defendant's

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[8] Caesars agreed below that the "motivating factor" standard applies to all disparate treatment cases, including those susceptible to pretext analysis. First, the company accepted Instruction No. 8, which required Costa to prove that gender was a "motivating factor" in her treatment. JA 33. Second, the very instructions on *pretext* that Caesars proffered below, which relied on model instructions crafted by the American Bar Association's Litigation Section, likewise employed the "motivating factor" language:

> circumstantial evidence would include proof . . . that would allow one to reasonably believe that gender was a *motivating factor* in the defendant's treatment of plaintiff.
>
> • • •
>
> the plaintiff must prove . . . that her sex was a *motivating factor* in the defendant's decision to discharge her. The plaintiff's sex was a *motivating factor* if you find that it played a role in the defendant's decision, even though other factors may also have played roles in that decision.

JA 23-24 (emphasis added).

treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason." JA 33. Not only was this an accurate statement of the law, it mirrored what Caesars itself proffered in its pretext-based instruction: "the plaintiff must prove . . . that her sex was a motivating factor in the defendant's decision to discharge her. The plaintiff's sex was a motivating factor if you find that it played a role in the defendant's decision, even though other factors may also have played roles in that decision." JA 24. In sum, the first paragraph of Instruction No. 9 did not give Costa anything that she did not have anyway.[9]

This leaves the second paragraph of No. 9, which said that if the jury found "that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons," then "[t]he plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision." JA 33. This also accurately reflects the law, *see* 42 U.S.C. § 2000e-5(g)(2)(B), and in any event Caesars did not object to the language. And this half of Instruction No. 9 benefited only Caesars Palace, because it gave Caesars a chance to avoid damages even if Costa proved that bias was a motivating factor in her treatment. This was not an instruction that any plaintiff would affirmatively offer.

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[9] Caesars italicizes part of the first sentence of the first paragraph of Instruction No. 9—"[y]ou have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons"—suggesting that this formulation may have prejudiced the jury. *See* Brief for Respondent at 44. This is a reach and in any event was not pressed below. At trial, Caesars objected to the court's giving *any* instruction on dual motivation, but it did not object to the language used: "I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction." JA 18.

Employers recognize that an instruction on dual motivation may help them defend EEO cases. For example, in *Jones v. WMATA, supra*, 946 F.Supp. 1011, the plaintiff employed a classic *Burdine* approach to prove that she had been fired for complaining about sex and age discrimination, in violation of the anti-retaliation strictures of Title VII and the Age Discrimination in Employment Act. Throughout the litigation, WMATA steadfastly denied that retaliation played any role in Jones' firing. After the close of the evidence, however, the agency sought an instruction on dual motivation. Judge Lamberth demurred:

> . . . this case was tried—not just pleaded—as a pretext case in which either legal or illegal motives, but not both, underlay the adverse employment actions.
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> * * *
>
> *In a case tried under the rubric of pretext, the defendant does not get a second bite at the apple to show that it would have taken the same action anyway.* * * * WMATA would at a minimum have been required to introduce evidence of a dual motive at trial. Instead, it argued that a non-pretextual legitimate reason was its sole motivating factor.

946 F.Supp. at 1017 (emphasis added).

More recently, the local United States Attorney's Office tried this approach when representing the defendant in *Porter v. Agency for International Development*, 240 F.Supp.2d 5 (D.D.C. 2002). As in *Jones v. WMATA*, the plaintiff "objected to defendant's request for the so-called 'mixed motive' instruction . . . that offers a complete defense to liability for damages if the employment action in question would have been taken anyway in the absence of discrimination." *Id.* at 7. The court "sustained plaintiff's objection and refused the instruction." *Id.*[10]

[10] Following a jury verdict favorable to the plaintiff, the court itself decided the dual motivation issue, ruling that the plaintiff would not have been promoted even in the absence of unlawful factors. *Id.* at 6. The propriety of the trial judge's deciding this question is not pertinent to the issues before the Court here.

The point here is not that the district courts in these cases were right or wrong in refusing requests for a dual motivation instruction. Instead, the point is that *defendants* were seeking the instruction, and plaintiffs opposed it. The notion that plaintiffs will always opt for a mixed motives approach because it is "more lenient" for them, Pet. App. 53a, or because "plaintiffs enjoy more favorable standards of liability in mixed-motive cases," *Fuller v. Phipps*, 67 F.3d at 1141, is wrong as both a legal and a factual matter.

In the present case, only the second paragraph of contested Instruction No. 9 afforded either party anything that Caesars Palace's own proposed instruction on pretext did not. And the second paragraph benefited Caesars, not Costa. So even if the district court erred in giving Instruction No. 9, the error did not harm Caesars. *See Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549, 559 (D.C. Cir. 1993) ("[i]t is well established that challenges to jury instructions are subject to the harmless error rule").

IV. COSTA PROVED A VIOLATION OF TITLE VII

The verdict here would easily survive a Rule 50 attack, where the court must "draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150. *See* Statement above and Pet. App. 36a-42a. The question is whether anything about the instructions requires upsetting the judgment. In fact, nothing does. In Instruction No. 8, the court properly (albeit briefly) charged the jury on the measure of proof needed to establish liability under Title VII. JA 33. Courts have upheld verdicts based on instructions virtually identical to No. 8. *See, e.g., Hennessy v. Penril Datacomm Networks*, 69 F.3d at 1350 ("an unlawful employment practice is established when the complaining party

demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice"). In any event, Caesars did not object and so cannot challenge Instruction No. 8 here. *See Price Waterhouse*, 490 U.S. at 240 n.5.

There is no problem with Instruction No. 8. That leaves only No. 9, the instruction on dual motivation. JA 33. On this record, it is not clear whether a dual motivation instruction was appropriate. This does not appear to have been a "cat's-paw" situation; nor was there a proven policy or practice of systemic discrimination by Caesars. Costa said that she was fired because of her sex, and Caesars said it was because of her disciplinary record. This would seem to pose the type of either-or choice characteristic of *Burdine's* pretext model, which is unsuitable for dual motivation treatment. Still, the *en banc* court was right in concluding that Costa's evidence, viewed favorably to her, proved a violation of Title VII. Pet. App. 36a-42a. And so, even assuming that the district court erred in giving an instruction on dual motivation, the question is whether Caesars Palace was harmed. And it plainly was not.

Instruction No. 9 benefited only Caesars. It said that the company could avoid damages by meeting the "same decision" test. Assuming that this case could have been resolved in classic binary fashion, Instruction No. 9 gave Caesars an undeserved "second bite at the apple." *Jones v. WMATA*, 946 F.Supp. at 1017. But the instruction did not help Catharina Costa.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 02-679

IN THE

Supreme Court of the United States

DESERT PALACE, INC., D/B/A CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; AMERICAN CIVIL LIBERTIES UNION; AARP; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; AND WOMEN EMPLOYED AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The following *amici* submit this brief, with the consent of the parties, in support of Respondent's argument that the Ninth Circuit properly held that Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, does not require a plaintiff to submit "direct" evidence of discrimination to have a jury instructed that an unlawful employment practice is established when a protected trait played "a motivating factor" in the employer's adverse action.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. More

---

[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

than fifty percent of AARP's members remain active in the work force and, thus, rely on the protections of Title VII, the Age Discrimination in Employment Act, and other federal laws prohibiting employment discrimination that will be affected by the Court's decision in this case. AARP has long advocated the liberal interpretation and vigorous enforcement of these statutes, which are of paramount importance to all employed people, including millions of older workers, who rely on them to deter, prevent, and remedy invidious discrimination in the work place.

The American Association of People with Disabilities ("AAPD") is the largest membership organization for people with disabilities, their family members and supporters. AAPD has a strong interest insuring laws like Title VII and the Americans with Disabilities Act are interpreted in a manner that provides maximum protection for our members' employment rights.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization of more than 300,000 members. The ACLU's Women's Rights Project has been a leader in the efforts to eliminate barriers to women's full equality.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its Affiliates have a long-standing interest in addressing matters of employment discrimination that have an impact on the Asian Pacific American community, and this interest has resulted in NAPALC's participation in a number of *amicus* briefs before the courts

The National Partnership for Women & Families ("National Partnership") is a national advocacy group that develops and promotes equal opportunity, quality health care, and economic security for women and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities.

Women Employed is a national membership association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed is committed to ensuring that laws such as Title VII are interpreted in a manner that provides maximum employment protection for all individuals.

This case involving the interpretation of the Civil Rights Act of 1991 is a matter of significant concern to all *amici* and will directly affect the rights of those they serve.

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991 entitles all disparate treatment discrimination plaintiffs to establish the defendant acted "because of" discrimination in violation of the law by showing unlawful bias was "a motivating factor" in the adverse employment action. Petitioner's contention that the "a motivating factor" standard is limited to plaintiffs with "direct" evidence ignores the language, structure, and purposes of Title VII.

Price Waterhouse v. Hopkins does not require a plaintiff to have "direct" evidence to shift the burden of persuasion to the defendant, and the Civil Rights Act of 1991 supersedes that decision. In conjunction with the "a motivating factor" standard of causation, the *McDonnell Douglas-Burdine* framework remains a vital evidentiary tool in both "single motive" and "mixed-motives" discrimination cases. With some further elaboration, the instructions given at trial in this case provide a clear and coherent method, suitable for all Title VII disparate treatment actions, for a jury to resolve both the defendant's liability for discrimination and the plaintiff's entitlement, if any, to monetary damages.

ARGUMENT

I. *McDonnell Douglas-Burdine* And *Price Waterhouse v. Hopkins* Are Simply Alternative Ways To Prove A Title VII Defendant Acted "Because Of" Discrimination.

Titie VII prohibits employers from discriminating against employees "because of" race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a). Similarly, the statute prevents employment agencies, labor organizations, and training programs from discriminating "because of" a prohibited characteristic. 42 U.S.C. § 2000e-2(b), (c) & (d). The central focus in any disparate treatment case is whether the defendant has treated some people less favorably than others "because of" an unlawful reason. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978).

The Court has previously set forth two frameworks through which a plaintiff may meet the statutory burden. The first of these traces it origins to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). Both *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), and *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000), further clarified the mechanics of the so-called *McDonnell Douglas-Burdine* framework.

Under *McDonnell Douglas-Burdine*, the plaintiff first establishes a *prima facie* case of discrimination. *Hicks*, 509 U.S. at 506. The *prima facie* case eliminates the most common possible non-discriminatory explanations for the defendant's conduct. *Burdine*, 450 U.S. at 254; *Furnco*, 438 U.S. at 577, 579-80. If the plaintiff establishes a *prima facie* case, then a rebuttable presumption of discrimination arises.

Hicks, 509 U.S. at 507. The defendant must produce some evidence of a legitimate non-discriminatory reason for its actions, or the plaintiff is entitled to judgment as a matter of law. *Id.*

If the defendant meets its burden of production, the presumption of discrimination dissipates. *Id.* The plaintiff must then must show that the defendant acted "because of" unlawful discrimination. *Id.* at 508. Under *McDonnell Douglas-Burdine*, the plaintiff may do so either (1) "directly" by proving that the defendant more likely than not acted "because of" a discriminatory reason; or (2) "indirectly" by showing the defendant's proffered explanation is "unworthy of belief" and a mere pretext for discrimination. *Burdine*, 450 U.S. at 256; *Reeves*, 530 U.S. at 143. If a plaintiff proves that the defendant's explanation is "unworthy of belief," the finder of fact may, but need not, infer the defendant acted "because of" discrimination. *Reeves*, 530 U.S. at 147-48.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), six Justices agreed that *McDonnell Douglas-Burdine* was not the sole method through which a plaintiff could prove the defendant acted "because of" discrimination. The four-Justice plurality, Justice White, and Justice O'Connor differed as to how a plaintiff could show discrimination "because of" a prohibited factor. All six Justices of the *Hopkins* majority concluded, however, that if the plaintiff shows that an unlawful motivation played some part in the defendant's action, the defendant avoids liability altogether by proving it would have taken the same action in any event. The defendant thereby shows that discrimination was not a "but-for" cause of its actions. The method of proof the Court set forth in *Hopkins* has become known as the "mixed-motives" framework.

II. Under The Civil Rights Act Of 1991, A Title VII Plaintiff Shows The Defendant Acted "Because Of" Discrimination By Showing Unlawful Bias Was "A Motivating Factor."

Responding to *Hopkins*, in 1991 Congress added three provisions to Title VII. Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1071 (1991). First, Congress resolved the debate among the Justices in *Hopkins* as to the meaning of "because of" by providing that

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Section 107(a), codified at 42 U.S.C. § 2000e-2(m) (emphasis added). Second, Congress defined "demonstrates" as "meets the burdens of production and persuasion." 42 U.S.C. § 2000e(m).

Third, Congress disagreed with the *Hopkins* Court that the defendant could avoid liability by proving it would have taken the same action even without any discriminatory motivation. Instead, Congress gave the employer an opportunity to limit the plaintiff's remedies in certain cases by providing that:

> On a claim in which an individual proves a violation under section 2000e-2(m) of this title [section 703(m)] and a respondent

> demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor the court–
>
> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Section 107(b), codified at 42 U.S.C. § 2000e-5(g)(2)(B)(i)-(ii).

In answering the question before the Court of whether a Title VII plaintiff must present "direct" evidence to obtain an "a motivating factor" jury instruction pursuant to 42 U.S.C. § 2000e-2(m), the Court should first determine whether the statutory language has a plain and unambiguous meaning. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If so, the inquiry must end as long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation omitted). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole. *Id.* Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)).

The statutory language here is plain. Congress has provided that, in any disparate treatment case,[2] a Title VII plaintiff proves the defendant acted "because of" discrimination by showing unlawful bias was "a motivating factor" in the employment practice at issue. The Court should hold that when Congress said "any employment practice" it meant "any." As the *en banc* court properly held in this case, the Civil Rights Act of 1991 sets "a motivating factor" as the causation standard for all cases of Title VII disparate treatment discrimination. *Costa v. Desert Palace Inc.*, 299 F.3d 838, 850-51 & n.2 (9th Cir. 2002) (en banc); *accord Harris v. Shelby County Bd. of Ed.*, 99 F.3d 1078, 1084 (11th Cir. 1996) ("the plaintiff in a Title VII action prevails whenever he or she proves that one of the delineated characteristics was a 'motivating factor' behind a particular employment decision").

If Congress had intended to limit section § 2000e-2(m) to only those cases where the plaintiff has "direct" evidence, one would have expected to find some indication of that in the statutory text, or the legislative history. It is not to be found. It is hard to believe that if Congress meant to limit the application of section 2000e-2(m) to only plaintiffs who have "direct" evidence, it did not say so there or in section 2000e-(m), particularly since such a requirement would be a sharp departure from general legal principles.

The Court has held that in a Title VII case, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *United States Postal Serv. Bd. of*

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[2] The provision's "[e]xcept as provided elsewhere in this subchapter" language refers, for example, to the different standard of causation for disparate impact cases set forth in 42 U.S.C. § 2000e-2(k).

Governors v. Aikens, 460 U.S. 711, 714 n.7 (1983). Juries are routinely instructed "that the law makes no distinction between the weight to be given to either direct or circumstantial evidence." 1 Edward J. Devitt & Charles B. Blackmar, *Federal Jury Practice & Instructions* § 15.02, at 441-42 (3d ed. 1977). Federal pattern jury instructions are in accord.[3]

As the Second Circuit has noted, "[i]f a jury can give equal or greater weight to circumstantial evidence, then requiring only 'direct' evidence to sustain a plaintiff's burden of proof is not only unhelpful, it is baffling." *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1184 (2d Cir. 1992); *accord Thomas v. NFL Players Ass'n*, 131 F.3d 198, 203-05 (D.C. Cir. 1997).[4] Insistence upon the production of "direct" evidence before a plaintiff may take advantage of the statutory "a motivating factor" causation standard, or limiting that standard to "mixed-motives" cases, confuses (1) the standard for causation, (2) the type of evidence necessary to meet that standard, and (3) a defendant's affirmative defense that it had more than one motivation with respect to the employment practice at issue. *Costa*, 299 F.3d at 851.

The Government's attempt to rewrite the Civil Rights Act of 1991 to infer a "direct" evidence requirement is

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3 *See* The United States Courts of Appeal Fifth Judicial Circuit Pattern Jury Instructions (civil cases) 2.18 (1999); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 1.02 (April 2001); Ninth Circuit Manual of Model Civil Jury Instructions (Civil) 3.5 (2001); Eleventh Circuit Pattern Civil Jury Instruction (Civil Cases) 2.2 (1999).

4 These decisions, as well as *Harris v. Shelby County Bd. of Ed.*, cited above, belie the Government's claim that the Ninth Circuit's decision in this case stands alone. Brief of the United States ("Govt. Br.") at 17.

unpersuasive. The Government asserts "any employment practice" as used in section 2000e-2(m) does not really mean that. It argues that this provision applies only in "mixed-motives cases." Govt. Br. at 18. The Government asserts that by including the phrase "even though other factors also motivated the practice" at the end of section 2000e-2(m), Congress intended for this section to apply only when the defendant is motivated by a combination of lawful and unlawful motives, but not when the defendant's motivations are wholly unlawful. *Id.* at 19. This argument ignores the accepted rules of statutory construction and defies common sense.

The Government effectively rewrites "even though other factors also motivated the practice" to read "but only when other factors also motivated the practice." The obvious reason for Congress's inclusion of the final clause of section 2000e-2(m) was to remove any doubt that a plaintiff could establish an unlawful employment practice by proving illegal bias was "a motivating factor" in the defendant's decision-making, regardless of whether other factors motivated the defendant. The text of section 2000e-2(m) provides no support for the Government's position.

The Government next argues that if Congress had really intended for the "a motivating factor" causation standard to apply to all disparate treatment cases, it would have amended section 2000e-2(a), rather than adding a separate, new statutory provision. *Id.* at 19. This would not, however, have accomplished Congress's intent. Section 2000e-2(a) applies only to unlawful employment practices committed by "employers." The prohibitions on unfair employment practices by employment agencies, labor organizations, and training programs are set forth in sections 2000e-2(b), (c) & (d), respectively. If Congress had

followed the Government's approach, Congress would have needed to amend separately sections 2000e-2(a), (b), (c) and (d) with "a motivating factor" language to cover all Title VII defendants. Congress wisely decided to save itself considerable trouble by amending section 2000e-2 once rather than four times.

The Government does not fare any better in its reliance on Congress' reference to section 2000e-2(m) in section 2000e-5(g)(2)(B) as an indication that Congress intended section 2000e-2(m) to apply only to "mixed motives" cases. *Id.* at 20. Congress obviously concluded that it was simpler to add a single provision specifying how a plaintiff proves a defendant acted "because of" discrimination, with a single reference to it in section 5(g)(2)(B), rather than references to at least four separate, amended provisions.

The Government's contention that section 2000e-2(m) does not apply to single motive, "pretext cases" litigated under the *McDonnell Douglas-Burdine* framework also leads to absurd results. The Government essentially argues that plaintiffs must show "but-for" causation to establish liability in single motive, pretext cases, but need show only discrimination was "a motivating factor" in "mixed motives" cases. Under the Government's reading of the statute, Congress intended a plaintiff to have a higher burden of proving causation when the defendant is motivated solely by illegal discrimination than when the defendant has both lawful and unlawful motives. The Government has offered no conceivable reason for a proof scheme so contrary to common sense. For this reason as well, the Court should reject the Government's strained construction of section 2000e-2(m).

In sum, the text, structure and purposes of Title VII show that in all disparate treatment cases arising under the Civil Rights Act of 1991, the plaintiff proves the defendant acted "because of " discrimination in violation of the statute by showing that unlawful bias was "a motivating factor." No "direct" evidence is required.

III. *Hopkins* Does Not Require A Plaintiff To Have "Direct" Evidence To Shift The Burden Of Persuasion To The Defendant, And, In Any Event, The Civil Rights Act Of 1991 Modifies The Applicable Holding Of That Case.

Petitioner and its *amici* contend that (1) *Hopkins* requires a plaintiff to have "direct" evidence of discrimination, and (2) that Congress intended to alter *Hopkins* only with respect to the consequences of the defendant's proof that it would have made the same decision absent any unlawful motivation. This argument is wrong on both counts.

A. Justice White's Opinion Controls *Hopkins*.

Writing for a plurality of four in *Hopkins*, Justice Brennan concluded that "because of" as used in Title VII did not mean "but-for" causation. 490 U.S. at 240. Instead, the plurality read the statute's several prohibitions on acting "because of" a discriminatory motive to prohibit a defendant from even taking an illegal criterion into account. The plurality determined that in order to show the defendant acted "because of" discrimination, the plaintiff had to show merely that illegal bias was "a motivating factor" in the defendant's conduct. *Id.* at 250-51. The plurality looked to *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393

(1983), as the basis for its framework of shifting the burden of persuasion to the defendant. *Hopkins*, 490 U.S. at 247-50, 254, 257.

Justice White largely agreed with the plurality's approach. He concurred with the plurality's reliance on *Mt. Healthy* as the source for the framework the Court was adopting in *Hopkins*. *Id.* at 258-60. Precisely because Justice White believed that *Mt. Healthy* provided the exact framework for analyzing Title VII cases, to shift the burden of persuasion he required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," in the defendant's action. *Id.* Petitioner concedes Justice White's opinion is straightforward application of *Mt. Healthy*. Pet. Br. at 14.

Justice O'Connor's concurrence parted ways with the plurality more fundamentally than did Justice White's. Justice O'Connor concluded the words "because of" in Title VII meant "but-for" causation. *Id.* at 262-63.[5] Like Justice White, Justice O'Connor required the plaintiff to show unlawful bias was "a substantial factor," and not just "a motivating factor," to shift the burden of persuasion. Unlike Justice White, Justice O'Connor required the plaintiff to demonstrate this through "direct" evidence.

Relying on *Marks v. United States*, 430 U.S. 188 (1977), Petitioner and its *amici* contend that Justice O'Connor's opinion constitutes the holding of the Court in *Hopkins*, because it constitutes the "narrowest" ground of

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[5] Justice White took no position on this question, as he considered the difference to be mere semantics, given that six Justices agreed the plaintiff recovered nothing if the defendant proved a "same action defense." *Id.* at 259.

decision. This is clearly incorrect. *See Nichols v. United States*, 511 U.S. 738, 743-47 (1994); *Waters v. Churchill*, 511 U.S. 661, 685-86 (1994) (Souter, J., concurring) (explaining how to apply *Marks* where five Justices agree on some, but not all, aspects of the plurality opinion).

In *Hopkins*, five Justices agreed that a plaintiff did not have to introduce "direct" evidence to shift the burden of persuasion to the defendant. Justice White's strict adherence to *Mt. Healthy*, which does not require a plaintiff to have "direct" evidence to shift the burden of persuasion,[6] leaves no doubt where he stood on this question. Only four Justices in *Hopkins*--Justice O'Connor and the three dissenters--concluded that a Title VII plaintiff must have "direct" evidence to shift the burden of persuasion.

Therefore, the holding of *Hopkins* is that if a plaintiff proves, by direct or circumstantial evidence, that unlawful bias was a substantial factor in the defendant's actions, the burden of persuasion shifts to the defendant to show it would have made the same decision in any event. This is still the rule, however, only for cases to which the 1991 amendments to Title VII do not apply.[7]

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[6] Nine of the 10 circuits to have considered the question have held that *Mt. Healthy* does not have a direct evidence requirement: *Lynch v. City of Boston*, 180 F.3d 1, 12 (1st Cir. 1999); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990); *Gonzales v. Dallas County*, 249 F.3d 412 n.6 (5th Cir. 2001); *Sowards v. Loudon County*, 203 F.3d 426, 431 n.1 (6th Cir. 2000); *Pugh v. City of Attica*, 259 F.3d 619, 629 (7th Cir. 2001); *Allen v. Iranon*, 283 F.3d 1070, 1074-75 (9th Cir. 2002); *Ballard v. Muskogee Reg'l Med. Ctr.*, 238 F.3d 1250, 1252 (10th Cir. 2001); *Spanier v. Morrison's Mgmt. Servs. Inc*, 822 F.2d 975, 979-80 (11th Cir. 1987); *contra Graning v. Sherburne Cty.*, 172 F.3d 611, 615 (8th Cir. 1999).

[7] Petitioner contends that affirming the Ninth Circuit would lead

B. Congress Adopted the *Hopkins*' Plurality's Approach To Shifting The Burden Of Persuasion.

Even if Petitioner were correct that *Hopkins* itself requires the plaintiff to have "direct" evidence to shift the burden of persuasions to the defendant, Congress overruled any such requirement in the 1991 amendments to Title VII.

By providing in section 2000e-2(m) that a plaintiff "establishes" an unlawful employment practice in violation of Title VII by demonstrating that unlawful bias played "a motivating factor" in the defendant's action, Congress endorsed the *Hopkins* plurality's interpretation that "because of" meant something less than "but-for" causation. Section 2000e-2(m) unambiguously adopts the plurality's "a motivating factor" causation threshold for shifting the burden of persuasion to the defendant. Congress thus repudiated the "a substantial factor" threshold that five Justices had endorsed in *Hopkins*. Moreover, by adopting the *Hopkins* plurality's test for when the burden of persuasion shifts to the defendant, Congress necessarily rejected any need for "direct" evidence.[8]

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to "confusion" in that some claims could be proved by showing discrimination was "a motivating factor" and some would have a higher burden of causation. Pet. Br. 27. For whatever reason, Congress excluded ADEA claims from section 2000e-(2)(m). The Court must enforce the statute Congress wrote, regardless of its wisdom.

[8] The Government cites a 1992 EEOC Enforcement Guide as support for its position that Congress endorsed a "direct" evidence requirement in the Civil Rights Act of 1991. Govt. Br. at 18. This section of the Enforcement Guide does not bear the weight the Government attempts to place on it. The EEOC intended this Enforcement Guide merely to "provide[] general information on the evaluation of charges" filed with the EEOC, for the benefit of agency investigators. *EEOC: Revised Enforcement Guide on Recent Developments in Disparate Treatment* (BNA) 405:6915 (July 7, 1992). It is not, and does not purport to be, a definitive EEOC interpretation of *Hopkins* or the Civil Rights Act of 1991, and is entitled to no deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In any event, the Enforcement Guide recognizes that "direct" evidence is not required to shift the burden of persuasion to the defendant. EEOC Enforcement Guide at n.18

Relying on one out-of context sentence in the legislative history of the 1991 amendments, Petitioner and its *amici* argue that Congress intended to overrule only "one aspect" of *Hopkins, i.e.*, that a plaintiff who proves unlawful bias played some part in the defendant's actions receives no relief if the defendant proves a "same action" defense. This is clearly wrong, even under Petitioner's erroneous reading of *Hopkins* and section 2000e-2(m).

Petitioner and its *amici* simultaneously claim: (1) that Justice O'Connor's concurring opinion controls *Hopkins* and (2) that section 2000e-2(m) applies to, and only to, "mixed motives" cases proved by "direct" evidence. Justice O'Connor's concurrence requires the plaintiff to prove that an unlawful bias was "a substantial factor" before the burden of persuasion shifts to the defendant, but section 2000e-2(m) lowers this threshold to "a motivating factor." Therefore, even under Petitioner's erroneous interpretation of the 1991 amendments to Title VII, Congress did more than just change the result when the defendant proves it would have taken the "same action" absent any unlawful motivation.

The legislative history of the 1991 Civil Rights Act makes clear that Congress did not read *Hopkins* to establish any sort of a "direct" evidence requirement. The very same

legislative history on which Petitioner and its *amici* rely sets forth what Congress considered to be the three significant holdings of *Hopkins*: (1) sex-stereotyping evidence is sufficient to prove gender discrimination; (2) the defendant not need prove a "same action defense" by clear and convincing evidence; and (3) where such a defense is proved, the plaintiff receives no relief. H.R. Rep. No. 102-40(I), pt. 1, at 45 & n.39 (1991). Conspicuously absent is any mention of a "direct" evidence holding. Because Congress did not believe *Hopkins* required the plaintiff to produce "direct" evidence of discrimination, it did not silently incorporate such a requirement from that case into the Civil Rights Act of 1991.

IV. *McDonnell Douglas-Burdine* Remains A Vital Tool For Resolving Whether A Title VII Defendant Acted "Because Of" Unlawful Discrimination.

Petitioner and its *amici* repeatedly assert that if the Court holds Title VII does not contain a "direct" evidence requirement, this will render obsolete the *McDonnell Douglas-Burdine* framework. Pet. Br. at 30-33; Govt. Br. at 23-24; Chamb. Br. at 15-16. This argument fundamentally misunderstands the function of *McDonnell Douglas-Burdine*, as well as the nature of "pretext" evidence. The 1991 amendments to Title VII do not erode *McDonnell Douglas-Burdine*.

McDonnell Douglas-Burdine "is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. This framework "was never intended to be rigid, mechanized, or ritualistic." *Id.* In enacting section 2000e-2(m), Congress modified the statutory definition of when a Title VII defendant acts

"because of" discrimination. By arguing that the Court should not apply the plain language of the statute, lest there be any diminution of *McDonnell Douglas-Burdine*, Petitioner and its *amici* have elevated a judicially-created evidentiary tool over an express Congressional mandate.

Over a quarter of a century ago, the Court held that *McDonnell Douglas* is simply one method for pursuing the inquiry whether the defendant acted "because of" discrimination. *Furnco*, 438 U.S. at 577. The framework "progressively sharpen[s] the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 255 n.8. This is because the fact-finder's disbelief of the reasons put forward by the defendant, together with the elements of the *prima facie* case, suffices to show intentional discrimination. *Reeves*, 530 U.S. at 147. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.*

A defendant's explanation for its actions can be pretextual in three ways. The proffered reason may (1) be factually false; (2) have played no role in the employment action at issue; or (3) have not been a "but-for" cause of the action. *E.g.*, *Wolf v. Buss (Am.) Inc.*, 77 F.3d 914, 919 (7th Cir 1996); *Dews v. A.B. Dick Co.*, 231 F.3d 106, 1021 (6th Cir. 2000).[9] "Pretext" evidence is just as useful whether the defendant has offered one or more than one legitimate reason

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[9] The following are the three types of pretext evidence. Assume a defendant asserts that it fired the plaintiff, who claims sex discrimination, because she was late to work every day for two weeks. The plaintiff can prove this explanation is pretextual by showing (1) she was on-time everyday; (2) she was late, but the defendant did not consider her lateness in firing her; or (3) the defendant considered her lateness, but would not have fired her if she had been a man.

for its actions. *Costa*, 299 F.3d at 857.

"One of the employer's purportedly legitimate explanations may be pretextual. On the other hand, another may not." *Id.* In a "mixed-motives" case the plaintiff will, in an effort to obtain damages, try to convince the fact-finder that the reasons the defendant claims would have caused it to take the same action even absent discrimination are unworthy of belief and pretextual. Therefore, the Ninth Circuit correctly held that "*McDonnell Douglas* and 'mixed motive' are not two opposing types of cases. Nor are "single motive" and "mixed motive" cases fundamentally different categories of cases." *Id.*[10]

At the summary judgment stage, a Title VII plaintiff must create a genuine issue whether discrimination was "a motivating factor" in the defendant's actions. Where the plaintiff invokes *McDonnell Douglas*, the trial court should apply that framework as set forth in this Court's precedents. If the evidence in the record, taken in the light most favorable to the plaintiff, including any pretext evidence, permits a reasonable jury to infer that discrimination was "a motivating factor" in the defendant's conduct, the trial court should deny summary judgment.

Under the Civil Rights Act of 1991, a plaintiff establishes liability, and may obtain some relief, even where discrimination was not a "but-for" cause of the defendant's conduct. For this reason, the plaintiff need not prove that all of the defendant's proffered explanations are pretextual, as

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10 The Government recognized this when briefing the *Hopkins* case: "we think the correct legal analysis should not vary depending on whether the case is categorized as one involving 'mixed motives' or 'single motives.'" *Hopkins v Price Waterhouse*, Brief of the United States, <http://www.usdoj.gov/osg/briefs/1987/sg870104.txt>.

long as a reasonable jury could find that discrimination was "a motivating factor." *Fields v. N.Y. State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 121-22 (2d Cir. 1997).[11]

Costa assumes that the trial judge will always be able to decide whether to categorize a particular case as "single motive" or "mixed-motives" before submitting it to the jury. *Id.* at 856-57 (citing *Hopkins*, 490 U.S. at 247 n.12 (plurality opinion)). Unfortunately, this may not be true. There will be cases where the defendant argues that all of its motives were non-discriminatory but, as a second line of defense, contends it would have made the same decision in any event. Where the defendant offers multiple reasons for its actions, the plaintiff may initially argue that all of them are pretexts for discrimination. As a fall-back position, the plaintiff may contend that even if some of the defendant's given reasons are factually true, discrimination was at least "a motivating factor" in the employer's actions. Sometimes the plaintiff will frame the case as "single motive," but the defendant will frame it as "mixed-motives." Furthermore, the trier-of-fact "may choose not to accept either party's litigating position as reflecting the whole truth." *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995).

Jury instructions must take into account the practical

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11 Several circuits have erroneously stated the defendant prevails at the summary judgment stage if the plaintiff does not have sufficient evidence from which a jury could find that all of the articulated reasons are pretexts for discrimination. *E.g, Fuentes v. Perskie*, 32 F.3d 759, 764-65 (3d Cir. 1994); *Wilson v. Am. Gen. Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999); *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000); *Wascura v. City of S. Miami*, 257 F.3d 1238, 1243 (11th Cir. 2001). This reasoning contradicts the plain language of 42 U.S.C. § 2000e-2(m).

reality that whether a case is actually "single motive" or "mixed-motives" may depend on the jury's resolution of specific disputed facts. Jury instructions must also permit the plaintiff and/or the defendant to argue "single motive" or "mixed-motives" in the alternative. The jury instructions and special interrogatories given here permitted the parties and the jury such flexibility. They also correctly set forth the questions a jury must consider in deciding the defendant's liability and the plaintiff's entitlement to monetary damages.

In any case subject to the Civil Rights Act of 1991, the court should inform the jury it must first decide whether discrimination was "a motivating factor" in the employment action at issue.[12] If the jury answers "no," the plaintiff loses. If the answer is "yes," the defendant is liable. The jury must next decide whether the defendant showed that lawful motivations also played a part in its action. If the jury answers "no" to this second question, then the case is a "single motive" situation, and the plaintiff is entitled to damages.

If the jury answers "yes" to the second question, a "mixed-motives" case has arisen. The jury then must decide whether the employer has shown it would have reached the same decision based only upon lawful reasons. If the answer to the third question is "no," the plaintiff is entitled to damages. If the response to the third question is "yes," the plaintiff is not entitled to damages. Thus, the Ninth Circuit's pattern jury instructions, which were given here, work for "single motive" and "mixed-motives" cases alike.

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[12] The instructions should probably set forth a definition of "a motivating factor." *Hopkins* provides the appropriate language: "whether gender was a factor in the employment decision at the moment it was made." 490 U.S. at 241 (plurality opinion; emphasis deleted). *See* Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 5.96 (Apr. 2001).

A court should give these same instructions in a case where the plaintiff relies on the *McDonnell Douglas-Burdine* framework. In such a case, however, additional instructions may be required. The jury should not be instructed on the framework's shifting burdens of productions and presumptions. *Hicks*, 509 U.S. at 509-10 & n.3. The *McDonnell Douglas* framework is, however, relevant to certain factual issues the jury may have to decide.

To prevail at trial, the plaintiff must factually establish all of the elements of her *prima facie* case. *Reeves*, 530 U.S. at 142. In many cases, the elements of the *prima facie* case will be undisputed, or the court can find them established as a matter of law. There may well be some cases where there is a genuine dispute whether the plaintiff has proven one of the elements of her *prima facie* case. If so, the jury should resolve this factual question. Where the elements of the *prima facie* case are undisputed, or have been established as a matter of law, the jury instructions need not even mention the phrase "*prima facie* case" or discuss its elements.

Either way, the court should inform the jury of the employer's articulated nondiscriminatory reason(s) for its actions. In accordance with the principles set forth in *Reeves*, as modified by 42 U.S.C. § 2000e-2(m), the jury should be told that if it disbelieves one or more of the defendant's reason(s) for its actions, then it may, but is not required to, find that discrimination was "a motivating factor" in the conduct at issue.[13] In this way, the jury will be instructed that it may "infer the ultimate fact of intentional discrimination" if it finds the employer's

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[13] *See* Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit 5.95 (Apr. 2001).

proffered reason "unpersuasive" or "unworthy of credence." *Reeves*, 530 U.S. at 146-147; *Hicks*, 509 U.S. at 511.

There is a split in the circuits whether it is an abuse of discretion for a court to refuse to give a "pretext instruction" where the evidence warrants it.[14] The more persuasive opinions reason that

> without a charge on pretext, the course of the jury's deliberations will depend on whether jurors are smart enough or intuitive enough to realize that inferences of discrimination may be drawn from the evidence establishing the plaintiff's prima facie case and the pretextual nature of the employer's proffered reasons for its actions. It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.

Smith v. Borough of Wilkinsburg, 147 F.3d 272, 281 (3d Cir. 1998). Here, the plaintiff did not request a "pretext instruction," and the court's failure to give one certainly caused no prejudice to Petitioner. As set forth above, the trial court gave the legally correct Title VII disparate treatment jury instructions for cases arising under the 1991 Civil Rights Act, with or without "direct" evidence.

[14] Three circuits have held such an instruction is mandatory: *Townshend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232 (10th Cir. 2002); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998); *Cabrera v. Jakabovitz*, 24 F.3d 372 (2d Cir. 1994). Two circuits have held it is not mandatory: *Palmer v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 969 (11th Cir. 2000), and *Gering v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). In *dicta*, two circuits have expressed doubt that such an instruction is mandatory: *Moore v. Robertson Fire Prot. Dist.*, 249 F.3d 786 (8th Cir. 2001) and *Fite v. Digital Equip. Corp.*, 232 F.3d 3 (1st. Cir. 2000). In *Cassino v. Reichold Chem. Inc.*, 817 F.2d 1338, 1344 (9th Cir. 1987), the court rejected a defendant's argument that the jury should be instructed that it must find both that discrimination was a "but-for" cause of the defendant's conduct and that the employer's reason was unworthy of belief, because such an instruction would have improperly required the jury to find that discrimination was the sole reason for the defendant's actions.

V. Any Attempt To Define "Direct" Evidence Is Futile.

Petitioner and its *amici* concede that the courts of appeals are in sharp disagreement over what constitutes "direct" evidence. They spend many pages vainly striving to make sense of the various definitions. Their briefs well document the confusion engendered by the ultimately futile attempt to define "direct" evidence. Indeed, Petitioner and the Government cannot even agree upon which definition of "direct evidence" the Court should adopt. *Compare* Pet. Br. at 40-43 with Govt. Br. at 24-29. No answer is what the wrong question begets. There is no reason for the Court to venture into the thicket of what is and is not "direct" evidence. The Civil Rights Act of 1991 establishes that a defendant violates the law if discrimination is "a motivating factor" in its conduct. As long as the jury finds by a preponderance of the evidence that the defendant acted "because of" discrimination, it makes no difference whether the jury reached this conclusion on the basis of direct or circumstantial evidence.

CONCLUSION

For the above reasons, the *amici* respectfully suggest that the judgment of the Ninth Circuit should be AFFIRMED.

Respectfully submitted,

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